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NOVEMBER, 1974]

## COMMENT

### THE AUTOMOBILE INVENTORY SEARCH AND *CADY v. DOMBROWSKI*

#### I. INTRODUCTION

Aptly, Mr. Justice Rehnquist has noted that the law of automobile searches "is something less than a seamless web."<sup>1</sup> No other issue arising under the fourth amendment has caused such difficulty in reconciling the practicalities of law enforcement and other public interests with the privacy interests of the individual. On the one hand, the fourth amendment to the United States Constitution operates to insure the right to privacy with the following language:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.<sup>2</sup>

This language has been interpreted to mean that in general, law enforcement officers must obtain a warrant in advance in order to conduct a lawful search. This rigid rule is subject to a number of exceptions necessitated by a strong public interest in obviating the requirement in certain situations.<sup>3</sup> However, even if no warrant is required, the search must be reasonable.<sup>4</sup>

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1. *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973).

2. U.S. CONST. amend. IV. The fourth amendment was made applicable to the states through the due process clause of the fourteenth amendment in *Wolf v. Colorado*, 338 U.S. 25 (1949).

3. See, e.g., *Player, Warrantless Searches and Seizures*, 5 GA. L. REV. 269, 270, 277-78 & n.31 (1971); Comment, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 836 & n.8 (1974). The exceptions to the warrant requirement are usually grouped in the category of "exigent circumstances" and have included certain sets of circumstances classified as follows: hot pursuit; destruction of evidence; search incident to arrest; and the automobile search. See *Player, supra*, at 277 n.31 and cases cited therein.

4. Comment, *supra* note 3, at 835. There has been some controversy over whether the failure to obtain a warrant when one is required will, by itself, render the search unreasonable without further inquiry into the reasonableness of the search. See J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 42-43 (1966); *Player, supra* note 3, at 269-70. The Supreme Court has held that at least in the area of search and seizure, a warrant is a prerequisite to a reasonable search, subject to certain exceptions. *Id.* at 278, quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Supreme Court utilized this two step analysis of reasonableness in upholding the warrantless search of the trunk of an automobile. *Id.* at 442. See note 153 *infra*.

One exception to the warrant clause is that of the automobile search. Due to the fact that an automobile could be driven to another county or state while police were securing a warrant, a warrant requirement would be highly impractical. Consequently, the Supreme Court of the United States has altered the application of the warrant rule to searches of vehicles by creating the "moving vehicle exception" which allows law enforcement officers to stop and search an automobile when they have probable cause to believe the vehicle contains evidence or contraband.<sup>5</sup> With the proliferation of automobiles have come problems of public management, traffic control, and protection of private property necessitating greater police contact with vehicles, often in a noninvestigative capacity.<sup>6</sup> Thus, the issue has arisen as to whether the seizure of contraband or evidence found in the course of a noninvestigative procedure such as an automobile inventory search is violative of the automobile owner's fourth amendment rights. Specifically, the questions are: 1) did the failure to obtain a warrant render the inventory unreasonable; and 2) if no warrant was required, was the inventory nonetheless unreasonable in light of the circumstances surrounding it?

The essential difference between an ordinary search and an automobile inventory is that the latter, at least from a theoretical standpoint, is not made for the purpose of discovering evidence or contraband. The most commonly stated purpose of the inventory is that of protecting personal property left inside automobiles impounded by police because of a parking violation, the arrest of the driver, an accident, or some similar occurrence, and to insulate the police from false claims for conversion of these items.<sup>7</sup>

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5. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

6. For instance, New York City police towed away 108,332 illegally parked cars in 1969 alone. *People v. Sullivan*, 29 N.Y.2d 69, 71, 272 N.E.2d 464, 465, 323 N.Y.S.2d 945, 947 (1971).

7. An extended discussion of the various justifications of the inventory search appears in section IID *infra*. Since many states have statutes defining the situations in which a car may or must be impounded, the practitioner should examine his state's statutes as a means of determining the validity of a particular impoundment. In Pennsylvania, for example, "abandoned" and "wrecked" vehicles may be removed to the nearest storage area if, in the opinion of the officer, it is necessary to protect the vehicle or its contents, under section 1222 of the Vehicle Code of 1959 [hereinafter Vehicle Code], PA. STAT. ANN. tit. 75, § 1222 (Supp. 1974). The term "abandoned vehicle" is defined by section 102 of the Vehicle Code to be an inoperable vehicle left unattended for 48 hours on public property; an unregistered vehicle left standing; and a vehicle left illegally on public or private property for more than 48 hours. *Id.* § 201. Officers are also permitted to impound commercial vehicles that violate weight limits. *Id.* § 903. Furthermore, local governments are permitted to enact ordinances permitting impoundment so long as approved areas of storage are designated and other procedural elements are provided. *Id.* § 1103.

One court discussed the impoundment issue as follows:

Reasonable cause for impoundment may, for example, include the necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to

The inventory usually consists of a thorough examination, removal, and listing of all items of value inside the passenger and luggage compartments, although the process sometimes extends into the engine or into sealed parcels.<sup>8</sup>

To date, courts in 21 states have held that an inventory into areas of an automobile which are *not* in plain view<sup>9</sup> does not violate the fourth amendment.<sup>10</sup> Although there are no cases on point, in several other jurisdictions courts have tended to agree with this position or have expressed views in dicta which could be used to support it.<sup>11</sup> At the present time, two state courts have held unconstitutional an inventory into areas not in plain view<sup>12</sup> and three others would seem to have favored this theory.<sup>13</sup> In four states, courts have not regarded an inventory as a search

deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway; (6) a car impoundable pursuant to ordinance or statute which provides therefore as in the case of forfeiture. The mere commission of one or more of the 27 bailable traffic offenses listed in JTR T2.03(m) does not necessarily provide reasonable cause for impoundment. . . . There is even case support for the view that if the driver cannot present his driver's license when arrested on a traffic violation, impoundment on that account is not required.

*State v. Singleton*, 9 Wash. App. 327, 332-33, 511 P.2d 1396, 1399-1400 (Ct. App. 1973) (citations omitted).

Also relevant to the issue of impoundment are: *Cotton v. United States*, 371 F.2d 385, 392 (9th Cir. 1967); *People v. Landa*, 30 Cal. App. 3d 487, 106 Cal. Rptr. 329 (Ct. App. 1973); *People v. Burke*, 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 531 (1964); *Mayfield v. United States*, 276 A.2d 123 (D.C. 1971); *United States v. Pannell*, 256 A.2d 925 (D.C. 1969); *Williams v. United States*, 170 A.2d 233 (Mun. Ct. App. D.C. 1961); *St. Paul v. Myles*, 298 Minn. 298, 218 N.W.2d 697 (1974); *State v. Jones*, 122 N.J. Super. 585, 301 A.2d 185 (Dist. Ct. 1973). *See also* *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Chambers v. Maroney*, 399 U.S. 42, 52 n.10 (1970); *Mestas v. Superior Court*, 99 Cal. Rptr. 581, 583 n.3 (Ct. App.), *rev'd on other grounds*, 7 Cal. 3d 537, 498 P.2d 977, 102 Cal. Rptr. 729 (1972).

8. *See, e.g.*, *United States v. Pennington*, 441 F.2d 249, 250 (5th Cir.), *cert. denied*, 404 U.S. 854 (1971); *Jackson v. State*, --- Miss. ---, 243 So. 2d 396, 397 (1970).

9. Under the "plain view" doctrine, police may seize evidence or contraband encountered inadvertently during an otherwise valid intrusion; thus, police may seize what they observe in a car if they have a legitimate reason to be in or around the vehicle. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971); *Harris v. United States*, 390 U.S. 234, 236 (1968) (*per curiam*). Since police may seize objects in plain view, there seems to be no reason why they would not be able to remove such items and make a list of them as part of an inventory.

10. Those states are Arizona, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Virginia, Utah, Washington, and Wisconsin. *See* Appendix Part I.

11. Those jurisdictions are the District of Columbia, Kentucky, and Michigan. *See* Appendix Part II.

12. California and Oregon adhere to this position. *See* Appendix Part III.

13. Those states are Maine, Missouri, and South Dakota. *See* Appendix Part IV.

for purposes of the fourth amendment<sup>14</sup> while three others have raised this issue without resolution.<sup>15</sup>

Federal case law in this area is more sophisticated and, yet, more elusive. The Fifth and Eighth Circuit Courts of Appeal, the only ones with holdings directly on point, are split upon the inventory issue.<sup>16</sup> There is no law on point within the First, Seventh, or Tenth Circuits,<sup>17</sup> and the remaining circuits are in various stages of uncertainty.<sup>18</sup>

The Supreme Court of the United States has not yet ruled upon the inventory issue. However, the Court in resolving related issues in the area of automobile searches, has struggled to find the evidence or contraband uncovered admissible and the intrusions reasonable.<sup>19</sup> Unfortunately, the Court's key opinions of the last decade display a shortsighted incrementalism which has produced law of obscure basis and uncertain direction. Because of the problems created by these decisions, the precise issue examined herein is pressing itself upon the Court.<sup>20</sup>

It is the purpose of this Comment to explore the conflicting rationales that have been offered in support of and against the inventory search, and to reach a conclusion upon the validity of the Supreme Court's pronouncements in the area. In this Comment, the term "automobile inventory search" will be limited in meaning to the search of areas within a legally impounded automobile which are not in plain view. In Part II, the various justifications and policy bases for the inventory search will be examined in order to determine whether there is any substantial public interest which would justify intrusions of this nature. Part III will discuss several important automobile search decisions from the Supreme Court of the United States as a means of explicating the impact of the Court's most recent decision in this area of the law, *Cady v. Dombrowski*.<sup>21</sup>

14. See *Mackall v. State*, 7 Md. App. 246, 255 A.2d 98 (Ct. Spec. App. 1969); *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372, cert. denied, 399 U.S. 912 (1970); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971); *State v. Dombrowski*, 44 Wis. 2d 486, 171 N.W.2d 349 (1969).

15. See *State v. All*, 17 N.C. App. 284, 193 S.E.2d 770 (Ct. App. 1973), cert. denied, 414 U.S. 866 (1973); *People v. Willis*, 46 Mich. 436, 208 N.W.2d 204 (Ct. App. 1973). In *State v. Tully*, \_\_\_\_ Conn. \_\_\_\_, \_\_\_\_ A.2d \_\_\_\_, 15 Crim. L. Rptr. 2041 (Sup. Ct. March 5, 1974), the court held that an inventory of items in plain view was not a search for purposes of the fourth amendment. *Id.*

16. See Appendix Part V.

17. See Appendix Part VI.

18. See Appendix Part VII.

19. See generally section IIIA *infra*.

20. Although there are two issues raised by inventories — whether a warrant is a prerequisite, and, if not, is a warrantless search reasonable under the circumstances — the former seems to have been clearly answered in the negative by the Court in *Cady v. Dombrowski*, 413 U.S. 433 (1973). Consequently, the primary focus of this Comment will be upon the reasonableness of an inventory assuming that a warrant is not required. An analysis of the *Dombrowski* Court's opinion with respect to the warrant issue is offered in a later portion of this Comment. See notes 162-63 & 166-70 and accompanying text *infra*.

21. 413 U.S. 433 (1973).

## II. THE BASES UPON WHICH INVENTORY SEARCHES MAY BE JUSTIFIED

Since a determination of the constitutionality of an inventory search depends ultimately upon a balancing of interests,<sup>22</sup> it is essential to examine the policy arguments that have been offered to justify this procedure. Unfortunately, courts in many cases on point merely state conclusions about reasonableness.<sup>23</sup> Other courts merely mention supporting factors without examining them in depth.<sup>24</sup> Hence, the purpose of this section is to evaluate the various justifications that have been articulated in support of the inventory search in the light of the individual's fourth amendment privacy interests.

### A. *Is an Inventory a Search for Purposes of the Fourth Amendment?*

Four jurisdictions hold that a proper inventory<sup>25</sup> is not a search for purposes of the fourth amendment.<sup>26</sup> The implicit basis for such conclusions is that the fourth amendment applies primarily, if not solely to government intrusions which have as their purpose the discovery of crime, the seizure of contraband, or the seizure of evidence. In the words of one court:

A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest.<sup>27</sup>

In New York, there must be a direct nexus between the intrusion and an intent to prosecute for there to be a search.<sup>28</sup> The Supreme Court of Nebraska has gone so far as to infer lack of intent to search from a finding that the officer did not have cause to believe the car contained contraband.<sup>29</sup>

22. As the Supreme Court has stated, "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

23. *See, e.g.*, *Gagnon v. State*, 212 So. 2d 337 (Dist. Ct. App. Fla. 1968); *Denson v. State*, 128 Ga. App. 456, 197 S.E.2d 156 (Ct. App. Ga. 1973).

24. *See, e.g.*, *Mackall v. State*, 7 Md. App. 246, 255 A.2d 98 (Ct. Spec. App. 1969); *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

25. Such an inventory would be one made of a lawfully impounded car (*see note 7 supra*) pursuant to a routine, administrative procedure, not as a subterfuge to search for evidence. *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372, *cert. denied*, 399 U.S. 912 (1970). Apparently, the presence or absence of subterfuge turns upon the subjective intentions of the officer making the inventory. The distinction required to be made by this formulation is not only an exceedingly difficult one, it is also of questionable importance. *See notes 30-34 & 55-56 and accompanying text infra*.

26. *See the cases cited in note 14 supra*.

27. *Haerr v. United States*, 240 F.2d 533, 535 (5th Cir. 1957).

28. *People v. Sullivan*, 29 N.Y.2d 69, 77, 272 N.E.2d 464, 469, 323 N.Y.S.2d 945, 952 (1971), *citing* MODEL CODE OF PRE-ARREST PROCEDURE art. 1, § SS 1.01, subd. [1] (Tent. Draft No. 3, 1970).

29. *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372, *cert. denied*, 399 U.S. 912 (1970).

Thus, in these jurisdictions a routine inventory procedure designed to protect private property or to insulate the police from tort claims after legal seizure of an automobile has not been regarded as a search under the fourth amendment.

Placing aside for the moment the obvious problem of having an individual's constitutional rights turn upon the intent and motives of a policeman, there are several objections to this theory. First, if police were to have wide discretion over which automobiles could be impounded, "inventories" could eliminate the need for "searches." Second, it is very difficult to prove subterfuge when an administrative procedure is often assumed to be reasonable by the courts.<sup>30</sup> Third, even if no bad faith or administrative sleight-of-hand is present, only those who were suspected of criminal activity at the time of the search would have a fourth amendment right to privacy with respect to the interior of their automobiles. As the Supreme Court of the United States stated in another context, "It is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior."<sup>31</sup>

Additionally, the New York view implies that the purpose of the fourth amendment is not to protect a citizen's privacy, but only to insulate him from unreasonable searches for evidence or contraband.<sup>32</sup> Simply from a policy standpoint, it would seem wise to have constitutional limitations upon the sovereign's right to invade, record, and reveal objects relating to an individual's private life regardless of the purpose of the invasion. The Supreme Court, when it has spoken to the issue, has broadly interpreted the purpose of the fourth amendment in order to protect the individual's privacy.<sup>33</sup>

As noted previously, the New York rule requires that the definition of a search depend upon the motives of the officer involved, rather than the actions and intrusions that are actually undertaken. It can be questioned whether or not the searching officer's purpose should matter when both

30. Cf. Comment, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521, 537-38 (1968).

31. *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (housing inspections are searches under the fourth amendment). See also Comment, *supra* note 3, at 849-50.

32. The court in *Cabbler v. Superintendent*, 374 F. Supp. 690 (E.D. Va. 1974), commented upon this theory as follows:

There have been decisions finding inventory procedures to be other than "searches" on the theories that there is no intent to seize anything or that there is in these situations no "reason" to search or expectation that criminal evidence will be discovered. . . . It is not the intent to seize incriminating evidence which makes governmental intrusions into private effects obnoxious in a free society, but the simple fact of intrusion itself under power of the state.

*Id.* at 693 (citations and footnote omitted).

33. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523 (1967), wherein the Court stated, "The basic purpose of the Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.* at 528.

the inventory and the search proceed in the same manner and have the same result — seizure of any evidence or contraband in the vehicle. For example, in the stop-and-frisk and housing inspection areas, the issue of whether or not the fourth amendment applies has turned not upon the purpose, but rather upon the *scope* of the intrusion into privacy interests; the purpose of the intrusion was relevant to its reasonableness.<sup>34</sup> Thus, the contention that an inventory is not a search because of its purpose, rather than its scope, is contrary to both reason and Supreme Court precedent.

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34. In *Camara v. Municipal Court*, 387 U.S. 527 (1967), the Supreme Court rejected the argument that because of its beneficial purpose, a housing inspection should not be considered a search for purposes of the fourth amendment by stating, "[I]nspections of the kind we are here considering do in fact jeopardize 'self-protection' interests of the property owner." *Id.* at 531. Although the Court held that a warrant was required for a housing inspection, it also said that "[w]here considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." *Id.* at 538, quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting).

The Court, in *Terry v. Ohio*, 392 U.S. 1 (1968), labelled the argument that a stop is not a seizure and a frisk is not a search as "fantastic" and a "sheer torture of the English language" in view of what these procedures entail. *Id.* at 16. According to the Court:

[T]he sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.

*Id.* at 17 n.15. See *Cabbler v. Superintendent*, 374 F. Supp. 690, 693 & n.2 (E.D. Va. 1974).

See *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950), wherein the court stated:

Distinction between "inspection" and "search" of a home has no basis in semantics, in constitutional history, or in reason. "Inspect" means to look at, and "search" means to look for. To say that the people, in requiring adoption of the Fourth Amendment, meant to restrict invasion of their homes if government officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny.

178 F.2d at 18.

But cf. *Wyman v. James*, 400 U.S. 309 (1971), where the Court ruled that a required visit by a welfare worker to the home of a client was not a search for purposes of the fourth amendment, but if a search, the intrusion was reasonable. The Court regarded the rehabilitative purpose of the visit as outweighing its acknowledged investigative aspects. *Id.* at 317-24. *Camara* was distinguished as a case arising in a criminal context (the defendant committed a misdemeanor by refusing a warrantless entry by the housing inspector) while in *Wyman*, the client was merely losing her welfare benefits. *Id.* at 325. *Wyman* indicates that the Burger Court views this area in a somewhat different light than did the Warren Court, which decided *Terry* and *Camara*.

The impact of *Wyman* upon the question of whether an inventory is a search was discussed recently in *Cabbler v. Superintendent*, *supra*. The *Cabbler* Court read *Wyman* as requiring that an intrusion must be "compelled" in order for the intrusion to be termed a search. Since the "element of compulsion [was] undisputed," the court believed that the inventory was a search under *Wyman*. *Id.* at 695.



B. *Can the Inventory Search Be Justified Upon the Basis That the Owner's Right to Privacy Is Diluted When the Fourth Amendment Is Applied to Automobiles?*

Granting that an inventory may be considered a search, the argument could nevertheless be made that fourth amendment principles apply differently to automobiles. Several cases present this view, as well as the notion that an individual's right to privacy in his car is inherently different from (and less than) that in his home.<sup>35</sup> Discussions leading in this direction have generally proceeded in a somewhat surreptitious manner because the Supreme Court has ruled, in *Katz v. United States*,<sup>36</sup> that the fourth amendment protects those places or things which one has a reasonable expectation of keeping private.<sup>37</sup> And it is clear that the fourth amendment does apply to automobiles.<sup>38</sup>

In light of *Katz*, it is submitted that an analysis of the inventory issue based upon the thesis that there exist varying degrees of the right of privacy is inappropriate because such an undertaking ignores the factual circumstances that give rise to conclusions that automobile searches are reasonable. The individual possesses a right under the fourth amendment to be free from *unreasonable* searches, whatever the area to be searched.<sup>39</sup> However, the frequency with which an *unreasonable* search occurs is less in some areas, such as the automobile, because given their peculiar attributes, there is a greater probability that circumstances will arise that will justify a search. Hence, because of the high probability that when an automobile search is made, circumstances will dictate that it is a reasonable search, the proper characterization of the owner's fourth amendment rights in his vehicle is that his expectation of privacy is less, rather than his

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35. One court seemed to express this view as follows:

The fundamental right of privacy connected with a man's home is understandably different and in greater need of protection than an automobile on the public right of way. In the latter case the police and other people using the public highway as well as the owner of the vehicle, have an interest which must be protected. *Heffley v. State*, 83 Nev. 100, 104, 423 P.2d 666, 668 (1967), *aff'd on other grounds*, 429 F.2d 1321 (9th Cir. 1970).

Another court has emphasized mobility as a ground for distinction:

A motor vehicle has been afforded some of the protections against "unreasonable" searches that traditionally were allowed to a man's home. Yet the vehicle is still a chattel. Given its high mobility it may be left by the owner in places where its presence conflicts with public and private rights of others; and what may be done with it by public authority depends ultimately on a balancing of conflicting community and personal interests.

*People v. Sullivan*, 29 N.Y.2d 69, 72, 272 N.E.2d 464, 465, 323 N.Y.S.2d 945, 947 (1971). See *Commonwealth v. Navarro*, \_\_\_\_ Mass. App. \_\_\_\_, 310 N.E.2d 372, 376 (1974) (interpreting to this effect *Cady v. Dombrowski*, 413 U.S. 433 (1973)).

36. 389 U.S. 347 (1967).

37. *Id.* at 351-52.

38. See, e.g., *Cady v. Dombrowski*, 414 U.S. 433, 439 (1973), where the Supreme Court stated that vehicles are "effects" under the fourth amendment.

39. See notes 2-4 and accompanying text *supra*.

right to privacy — protection against unreasonable searches — is less.<sup>40</sup> For example, in *Carroll v. United States*,<sup>41</sup> a warrantless search made with probable cause was deemed reasonable due to the possibility that the vehicle could have been removed from the control of the searching officers.<sup>42</sup> The basis for justifying the search was not that the theoretical right against unreasonable searches was diminished because an automobile was involved; rather, the circumstances were such that the search was reasonable.<sup>43</sup> In order to limit the extent of the expectation of privacy when an individual's automobile is impounded, an examination of the surrounding circumstances must be made to determine when and if an inventory is reasonable. To proceed upon a theory that the owner's fourth amendment rights in his automobile are diluted is to assume the very conclusion that is trying to be reached.

Moreover, the difficulty encountered in diluting the fourth amendment for automobile searches is the momentum driving one toward a use of degrees in describing the right to privacy. For example, one might have differing rights to privacy in the vehicle identification number, in an object on the front seat, in one under the seat, and in one inside a suitcase located in the trunk. Essentially, the courts would be entering a quagmire by substituting an analysis based upon dilution of the right to privacy for a theory based upon expectation of privacy. Nonetheless, it would appear that the Supreme Court is considering this line of thought.<sup>44</sup>

C. *Is Mere Custody of an Impounded Automobile Sufficient Justification for an Inventory Search?*

One factor present in the inventory situation that might tend to establish the reasonableness of the search is police possession of the vehicle. Virtually all courts which allow inventory searches require that police have

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40. For example, the Supreme Court recently ruled that scraping paint from the exterior of a car, with probable cause to believe the car had been involved in an accident, did not violate the defendant's right to privacy, if in fact such an interest existed in the exterior of the car. *Cardwell v. Lewis*, 417 U.S. 583 (1974). The plurality stated:

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view. . . . This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion.

*Id.* at 590-91.

41. 267 U.S. 132 (1925).

42. *Id.* at 156. For a discussion of this case, see notes 100-05 and accompanying text *infra*.

43. 267 U.S. at 156.

44. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Court voiced approval for "community caretaking" intrusions into automobiles while generally ignoring the privacy interests of the owner. *Id.* at 442-47. Failure to consider the owner's privacy interests seems to imply a dilution of the right to privacy in automobiles rather than

valid custody of the car.<sup>45</sup> However, some courts seem to emphasize the fact of custody as if custody justifies, or is an important factor in justifying, inventory searches.<sup>46</sup>

The apparent basis for this idea is an undifferentiated notion that an officer who takes custody of an automobile and its contents for protective purposes should be able to know exactly what he is protecting. For example, the court in *People v. Sullivan*<sup>47</sup> declared:

[Defendant] could not reasonably expect the police to leave a brief case in open sight in a storage facility or expect that they would not make sure when they took control of the brief case what it contained and record its contents.<sup>48</sup>

But it would seem that such a notion is inadequate to justify such an invasion of privacy unless there are other factors present which weigh upon the side of reasonableness, such as the intent to prevent tort claims by the owner against the police or to protect the property of the individual against theft. Since it is not necessary for police to open a briefcase, for example, in order to protect it, the owner's right to privacy should be respected. Thus, the majority of the courts that have dealt with the issue, have ruled that custody alone does not necessarily imply the right to search.<sup>49</sup> But custody, when viewed in conjunction with other factors, may make a search reasonable.<sup>50</sup>

45. See, e.g., *Boulet v. State*, 109 Ariz. 433, 511 P.2d 168 (1973); *United States v. Pannell*, 256 A.2d 925 (D.C. 1969).

46. In *Knight v. State*, 212 So. 2d 900 (Dist. Ct. App. Fla. 1968), police found a jewelry box during an inventory. The court ruled that once the box was in the possession of police, they could validly examine it to determine whether or not it contained contraband. *Id.* at 900. It was stated by the court in *Warrix v. State*, 50 Wis. 2d 368, 184 N.W.2d 189 (1971), that police could make "a custodial search and inventory" of a lawfully impounded vehicle. *Id.* at 376, 184 N.W.2d at 194.

In deciding the question of the reasonableness *vel non* of an automobile search, the Supreme Court has emphasized the fact that "the police had exercised a form of custody or control over the [automobile]." *Cady v. Dombrowski*, 413 U.S. 433, 442-43 (1973). Exactly what significance this fact had in *Dombrowski* or the other cases cited above is not evident from the opinions. However, in these cases, the factor of custody would seem to weigh in favor of reasonableness.

47. 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

48. *Id.* at 72, 272 N.E.2d at 466, 323 N.Y.S.2d at 947. The court did not explain why the defendant could not reasonably hold such an expectation.

49. *United States v. Lawson*, 487 F.2d 468, 475 (8th Cir. 1973); *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 710, 484 P.2d 84, 91, 94 Cal. Rptr. 412, 419 (1971); *People v. Burke*, 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 531 (1964). Cf. *Brett v. United States*, 412 F.2d 401, 406 (5th Cir. 1969); *Dodge v. Turner*, 274 F. Supp. 285, 291 (D. Utah 1967).

50. The Supreme Court, in *Cooper v. California*, 386 U.S. 58 (1967) stated: While it is true, as the lower court said, that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it" . . . the reason for and nature of the custody may constitutionally justify the search.

*Id.* at 61-62 (citation omitted).

For a discussion of this case, see notes 128-38 and accompanying text *infra*.

D. *Factors That May Justify an Inventory as a Reasonable Search*

Courts which uphold inventory searches generally require that they be made pursuant to a police regulation or a standard operating procedure, that is, in a routine, administrative manner.<sup>51</sup> These courts have failed to explain why this factor should tend to make the search reasonable. Although doing so with less than complete uniformity,<sup>52</sup> they have relied upon the existence of the routine procedure as one factor from which reasonableness can be inferred.<sup>53</sup>

The two most frequently cited reasons for the inventory search are the need to protect the police against unfounded tort claims alleging that property in an impounded auto disappeared, and the need to protect the owner's property interest in the contents of the car.<sup>54</sup> Two other justifications can be added: the inventory's usefulness as an internal investigatory procedure to apprehend police officers who steal from impounded automobiles, and the need to protect police and the storage area from explosives or loaded weapons possibly located inside an impounded vehicle.

In view of these alleged justifications, the apparent purpose behind introducing evidence of a standard operating procedure to protect valuables would seem to be to infer that the actual, subjective intention of the officer making the inventory was something other than the desire to search for evidence. If, however, the procedure is in itself reasonable, the officer's thoughts and motivations, if any, would seem to be irrelevant.<sup>55</sup> Thus, the

51. Although situations in which vehicles may be impounded are legislatively defined (see note 7 *supra*), the cases on point indicate that the inventory procedure is seldom mandated by statute or ordinance. In addition, it is unclear at what point a procedure becomes "standard." See *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972); *State v. Montague*, 73 Wash. 2d 381, 438 P.2d 571 (1968).

52. In *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973), the court stated: "However, we do think that the fact such a search is made pursuant to a police regulation should have no bearing in determining whether the search was reasonable under all circumstances." *Id.* at 476. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court found unpersuasive the argument that housing inspections were routine administrative procedures under local law. *Id.* at 530-31.

Clearly, an unreasonable intrusion is not made reasonable by repetition. *Cablier v. Superintendent*, 374 F. Supp. 690, 698 n.7 (E.D. Va. 1970). If anything, frequency makes it even more pernicious since both perpetrators and victims assume validity from general practice.

53. *E.g.*, *United States v. Kelehar*, 470 F.2d 176, 178 (5th Cir. 1972); *State v. Montague*, 73 Wash. 2d 381, 389-90, 438 P.2d 571, 574 (1968).

54. See, *e.g.*, *People v. Trusty*, \_\_\_\_\_ Colo. \_\_\_\_\_, 516 P.2d 423, 426 (1973); *Cablier v. Commonwealth*, 212 Va. 570, 184 S.E.2d 781, 782 (1971), *cert. denied*, 405 U.S. 1073 (1972).

55. A related conceptual problem arises from those cases which uphold an intrusion as a search with probable cause and alternatively as a valid inventory without subterfuge. See *United States v. Boyd*, 436 F.2d 1203 (5th Cir. 1971) (*per curiam*); *United States v. Smith*, 340 F. Supp. 1023 (D. Conn. 1972). In a somewhat analogous situation, an officer testified that he had searched a car seeking valuables, weapons, and identification of the car in *United States v. Pennington*, 441 F.2d 249, 250-51 (5th Cir.), *cert. denied*, 404 U.S. 854 (1971). A gun was found in the glove compartment. The court ruled that a search for weapons would have been unconstitutional, but upheld the search as an inventory, stating that the protection

focus of the inquiry should be upon the need for the intrusion, its scope, and the surrounding circumstances.<sup>56</sup> It is the intention of this section of the Comment to demonstrate that in most cases, an inventory is not justified by those factors described.

Since police have an ill-defined duty under bailment law to afford some kind of protection to property that comes into their possession,<sup>57</sup> it is arguable that an inventory is necessary to protect police from possible claims of conversion if the property is lost or stolen. However, it is submitted that this theory is more rhetoric than substance. Although a few courts speak of citizen complaints in a general way,<sup>58</sup> no reported

of the owner's property "was clearly the real purpose of the inventory here undertaken, which uncovered the pistol." 441 F.2d at 252.

It would appear that one could not allege the existence of probable cause and the conduct of a valid inventory consistently: if an officer has probable cause to believe an automobile contains evidence or contraband, it is doubtful that his purpose in making a search would be to protect valuables. Thus, where subjective intention determines whether subterfuge exists, the slightest hint of reason to believe the car contains contraband or evidence should invalidate the warrantless search as an inventory. Of course, the search may still satisfy the requirements of the fourth amendment under the automobile exception, provided the requisite circumstances are present. See notes 4-5 and accompanying text *supra*.

56. As the court in *Boulet v. State*, 109 Ariz. 433, 511 P.2d 168 (1973), stated:

We believe that there has been unnecessary confusion caused by insisting upon an either/or requirement as to the motives for inventorying the contents of the automobile. It is unrealistic to require that in justifying the inventory search the police must affirm that they had no hope or expectation of finding something incriminating. What makes an inventory search reasonable under the requirements of the Fourth Amendment is not that the subjective motives of the police were simplistically pure, but whether the facts of the situation indicate that an inventory is reasonable under the circumstances.

*Id.* at 435, 511 P.2d at 170.

57. When police impound a vehicle, they may be deemed gratuitous bailees of the vehicle and its contents. Gratuitous bailees have been defined as those who care for another's goods or perform some service with respect to them gratuitously. R. BROWN, *THE LAW OF PERSONAL PROPERTY* 328 (2d ed. 1955). The duty of a gratuitous bailee with respect to the items in his possession is not altogether clear. The traditional view, and the one still held by many courts, is that a gratuitous bailee is only liable to the owner if the goods are damaged or lost through his gross negligence. *Id.* at 328-29. A recent trend has been to redefine gross negligence as a lack of ordinary care in view of the surrounding circumstances. *Id.* at 331-35.

Police might also be considered to be involuntary bailees, that is, those who come into possession of another's goods inadvertently, by mistake, or because of necessity without a contract with the owner. Involuntary bailees are obliged to use ordinary care when in possession of the goods but are only liable for negligent misdelivery. See generally *id.* 399-415.

58. In *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1073 (1972), the court observed:

In 1964 or 1965, however, complaints were made and claims for reimbursement filed by the owners of vehicles who claimed property was lost or stolen while their cars were so stored. The procedure for removal, inventory and separate storage of the contents of vehicles in safekeeping was instituted then in an effort to prevent theft or loss of property from stored vehicles.

212 Va. at 522, 184 S.E.2d at 782.

Another court has remarked:

Many times claims against the police have been made by the accused that personal property had disappeared from his car while he and the car were in police

inventory search case to date has cited a specific instance of police liability for goods left in a car that has been impounded.<sup>50</sup> In the only case to consider the bailment issue in depth, *Mozzetti v. Superior Court*,<sup>60</sup> the Supreme Court of California concluded that the police were, at most, involuntary bailees<sup>61</sup> whose required standard of care could be fulfilled by rolling up the windows and locking the doors.<sup>62</sup> Other courts have addressed the issue by reasoning that fewer questions will be raised if police do not search sealed parcels.<sup>63</sup>

It is not the intention of this Comment to meander through the intricacies of bailment law, which varies from state to state, if not from court to court.<sup>64</sup> But it would seem that the false specter of tort liability, canted blindly in case after case, should not outweigh the individual's fourth amendment right to privacy. It is submitted that the threat of successful tort suits is minimal because the claimant has the difficult burden of proving: 1) that the goods allegedly stolen were in the auto at the time of impoundment; and 2) a violation of the appropriate standard of care by police.<sup>65</sup> As one court said:

The dangers of false claims prevailing under these circumstances, while not nonexistent, are sufficiently minute to make the sacrifice of constitutionally protected interests for the purpose of further diminishing those dangers patently unreasonable.<sup>66</sup>

If, on the other hand, the concern is not the probability of successful suits, but either the burden imposed in defending spurious ones or the desire to prevent allegations against police, then it can be argued that such claims can be made despite the inventory procedure. For example, one could allege that the officer who made the inventory converted goods which

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custody. To protect the police from such claims, a custodial search and inventory may be made of the personal property in a car which can be easily removed. *Warrix v. State*, 50 Wis. 2d 368, 376, 184 N.W.2d 189, 194 (1971).

59. Noting this remarkable phenomenon was the Delaware Supreme Court in *State v. Gwinn*, 301 A.2d 291 (Del. 1973):

Moreover, the probability of civil liability on the part of a police officer, for loss or theft of property during impoundment of an automobile, is unsupported by experience; the State is unable to cite any example of such liability, here or elsewhere.

*Id.* at 294.

60. 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971) (en banc).

61. See note 57 *supra*.

62. *Id.* at 708, 484 P.2d at 89-90, 94 Cal. Rptr. at 417-18. See *United States v. Lawson*, 487 F.2d 468, 475-76 (8th Cir. 1973). But see *St. Paul v. Myles*, 298 Minn. 298, 218 N.W.2d 697 (1974), where the Supreme Court of Minnesota stated that merely locking up the automobile might not protect the city from liability if the contents were stolen, because the city would have the burden of showing it was not negligent. *Id.* at 300 & n.1, 218 N.W.2d at 699 & n.1.

63. See *Dodge v. Turner*, 274 F. Supp. 285, 291 (D. Utah 1967); *State v. Gwinn*, 301 A.2d 291, 294 (Del. 1973). In the latter case, the Delaware Supreme Court instituted a judicial rule: "[T]he police officer will be protected henceforth by the law of this case holding that he has no duty under the law to open closed baggage in order to secure its contents." *Id.* at 294.

64. See R. BROWN, *supra* note 57, at 319-26, 399-415.

65. See generally *id.* at 257-69.

66. *Cabell v. Superior Court*, 374 F. Supp. 690, 700 (E.D. Va. 1974).

were inside the car. In any event, the public interest in minimizing suits against the municipality could be better served by imposing a judicial rule, similar to the one in *State v. Gwinn*,<sup>67</sup> to the effect that police officers will not be liable for conversion if property is lost or stolen because the officers did not search closed areas or packages.<sup>68</sup>

Closely related to the argument that inventories are necessary to protect police against claims of conversion of property left inside impounded automobiles is the contention that an inventory is reasonable because it is the most effective means of safeguarding this property. The emphasis is not upon the protection of the police, but upon the protection of the owner.

It seems reasonable to assume that most people realize that automobiles are rather vulnerable to the skilled or determined thief and, as a result, do not willingly leave items of great value in an unattended auto for long periods of time for fear of theft. As one court noted, "It is not unusual for items to disappear from parked vehicles in this jurisdiction, in spite of well lit parking lots and locked doors."<sup>69</sup>

However, the desire to protect the property of the owner of the impounded automobile should not be the sole consideration in examining the constitutional validity of an inventory — it is merely a factor to be used in determining what is an unreasonable invasion of one's privacy. The reasonableness of the inventory depends upon all surrounding circumstances. In *Terry v. Ohio*<sup>70</sup> the Supreme Court of the United States said:

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in the light of all the exigencies of the case, a central element in the analysis of reasonableness.<sup>71</sup>

This language suggests that in determining the reasonableness of the use of an inventory procedure to protect property located in impounded vehicles, a court must consider the available alternative methods of protection involving less intrusion into the privacy interests of the owner.<sup>72</sup>

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67. 301 A.2d 291 (Del. 1973).

68. See note 63 *supra*. Such a rule might be legislatively prescribed as well. In Pennsylvania, for example, officers who remove unattended, abandoned, or wrecked vehicles to nearby storage areas under section 1222 of the Vehicle Code are not liable for damage or loss of contents of the vehicle. PA. STAT. ANN. tit. 75, § 1222 (Supp. 1974).

69. *United States v. Fuller*, 277 F. Supp. 97, 99 (D.D.C. 1967), *aff'd*, 433 F.2d 533 (D.C. Cir. 1970) (per curiam).

70. 392 U.S. 1 (1968).

71. *Id.* at 17-18 n.15. See *Camara v. Municipal Court*, 387 U.S. 527 (1967), where the Supreme Court found that the intrusion of a housing inspection was a search requiring a warrant, despite the obviously laudable purpose and routine nature of the procedure. *Id.* at 520.

72. Thus, the opening of packages found inside an automobile would entail a wider scope of search than merely peering into the windows. Although the material quoted refers to "personal security" (see text accompanying note 64 *supra*) and the *Terry* case involved a stop and frisk, the principle is applicable here, since an individual's right to privacy in the interior of his automobile is not any less than in other areas. See notes 39-43 and accompanying text *supra*.

Upon this basis, it would seem that the additional safety that is afforded when police rummage through luggage and closed parcels is not justified in view of the fact that these items could be protected adequately without police knowing their contents by leaving them inside the car or by storing them elsewhere.<sup>73</sup> Such a search should, therefore, be held unreasonable.<sup>74</sup>

With respect to the mere removal of items located in closed areas of the impounded automobile, a strong argument may be made for the reasonableness of such a limited inventory procedure. The apparent alternative would be to provide constant guard over the lots where the impounded vehicles are stored — a method which may often prove to be impractical in terms of police manpower and resources that must be expended.<sup>75</sup> Consequently, police would not only be able to remove items that they observed in plain view, but would also be able to search the entire vehicle, including the trunk, under the theory that such is necessary to protect the owner's property.<sup>76</sup>

This conclusion may be challenged upon the basis that those who drive automobiles and carry valuables must be deemed to assume some risk of theft. Although owners have a right to expect some police protection over unattended vehicles, they can hardly expect any *added* protection, such as an inventory would provide, when they increase the risk of theft by affording the police cause to impound.<sup>77</sup> As a result, because an individual who is to be away from his car for a period of time can do no more than roll up the windows and lock the doors, it would seem reasonable, in view of the

73. The possible existence of explosives and other dangerous devices in these locations presents a slightly different issue and is therefore discussed elsewhere in this Comment. See notes 82-89 and accompanying text *infra*.

74. See *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

75. The place where impounded vehicles are stored would be one factor in determining the reasonableness of the procedures followed. For example, a lot located in an isolated area away from police activity would weigh in favor of opening the car and removing all contents. On the other hand, if the automobile is kept in a police garage where the danger of theft is lessened, there would be more reason to declare the procedure unreasonable.

76. In *State v. Gwinn*, 301 A.2d 291 (Del. 1973), police arrested defendant for drunken driving. Before his car was towed and impounded, police made an inventory pursuant to standard procedure. A closed satchel was found in the trunk; it was opened and marijuana discovered inside. *Id.* at 292-93. The court stated that the inventory of the interior of the automobile, including the trunk, was a reasonable search, and the seizure of the satchel was valid because it was in plain view. However, the court held that the evidence found inside was inadmissible because the search of the contents of the satchel was not necessary to the otherwise valid purpose of the inventory. *Id.* at 293-94.

77. See note 7 *supra*. For example, an owner who illegally parks assumes the risk that his vehicle will be towed and therefore not be subject to his control for a period longer than that which would have elapsed had he properly parked his car. While it may be argued that he has the right to expect protection when it is impounded, it hardly seems equitable to require police to remove objects, especially



individual's privacy interests, to limit police to the same "precautions" after the automobile is impounded.<sup>78</sup>

Such a conclusion necessarily prefers the individual's privacy interests over the possibility of his pecuniary loss. In so doing, it is consistent with the primary purpose of the fourth amendment — to protect privacy.<sup>79</sup> The landmark decisions in which warrantless searches were found to be reasonable<sup>80</sup> were based not upon the necessity of safeguarding individual pecuniary interests, but upon such considerations as the impracticality of obtaining a warrant to seize contraband that an officer had probable cause to believe was located in a movable vehicle,<sup>81</sup> the prevention of harm to an arresting officer from weapons possibly located near the suspect,<sup>82</sup> and the possible destruction of evidence within the suspect's immediate area of control.<sup>83</sup> In addition, these considerations justified searches of the person and surroundings of a *suspect* alleged to be committing or to have committed a crime. In contrast, the inventory search is used to protect the property of a *potential victim* against possible future theft. Not only is the existence of a crime much more speculative under the property justification for the inventory, it is the potential victim, rather than the suspect, whose privacy interests are infringed.

As a result, it would seem that the reasons of public policy used to justify warrantless searches are not applicable to the inventory procedure. The failure to conduct a search affects only the owner and the safety of his property.<sup>84</sup> Should the owner value his property more than his privacy, he is free to consent to an inventory by waiving his fourth amendment rights.<sup>85</sup>

The automobile inventory search is a very effective means of achieving a worthy goal — protecting property in vehicles impounded by police. But

78. In *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973), and *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971), the courts believed that this was all that was necessary on the part of the police. 487 F.2d at 477; 4 Cal. 3d at 709, 484 P.2d at 89, 94 Cal. Rptr. at 417. This argument presupposes an auto with functional locks and windows. If this is not the case, more intrusive measures to protect the owner's property may be reasonable.

79. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

80. See note 3 and accompanying text *supra*.

81. See *Carroll v. United States*, 267 U.S. 132 (1925).

82. *Preston v. United States*, 376 U.S. 364, 367 (1964).

83. *Chimel v. California*, 395 U.S. 752 (1969). See *Schmerber v. California*, 384 U.S. 757 (1966).

84. As to the danger to the public of weapons or explosive devices in an impounded vehicle, see notes 82-89 and accompanying text *infra*. Such a danger has more bearing on the physical safety of the storage bailee or police than the property protection justification for the inventory procedure.

85. In *Cabbler v. Superintendent*, 374 F. Supp. 690 (E.D. Va. 1974), the court noted: "To the extent that the inventory is conducted for the benefit of the owner of the vehicle, it is unclear why he cannot be asked if he wants the benefit of such protection." *Id.* at 700. Of course, this position assumes that the owner is available at the time of impounding or shortly thereafter. While this may be true in some

as the Supreme Court noted in *Chimel v. California*,<sup>86</sup> the issue is not one's subjective feeling about the acceptability of a particular police practice: the issue is whether the practice squares with the fourth amendment's command of privacy in one's person and effects.<sup>87</sup>

Another justification for the inventory procedure is the possible use of the inventory as an internal security device to apprehend dishonest police officers who would violate the public trust by stealing property from impounded cars.<sup>88</sup> Essentially a make-weight, this argument can be used as part of a flurry of reasons which, although insubstantial individually, create enough dead weight together to tip the scales in favor of reasonableness. Internal security can be achieved through other means<sup>89</sup> and it would be anomalous for police to violate the individual's fourth amendment rights, if such is the case, in order to protect him from the illegal behavior of other police. Moreover, a dishonest inventory-taker could merely omit from the list of effects those which he wished to steal, thus leaving the owner in the same straits as before — dependent upon the honesty of the police. The inventory search procedure cannot stand on so slender a reed.

The final basis upon which automobile inventories might be justified as reasonable searches is the need to safeguard the police and public against injury caused by explosives or weapons secreted inside luggage or closed parts of the car. Where this contention has been raised, it has received a generally unfavorable reception.<sup>90</sup> One source of support is found in *United States v. Grill*<sup>91</sup> where federal agents were certain that the defendant had rigged an explosive device in a package that had been seized, and were found to have acted reasonably in inspecting his luggage.<sup>92</sup> Similarly, a search of a vehicle under police care has been allowed when police had a

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situations such as impoundment after arrest, it may not be so in others, as in the case where an illegally parked vehicle is towed to a storage area. In these instances, it is not possible to imply consent by the owner because consent must be voluntarily given in response to an officer's request. *Schneckloth v. Bustamonte*, 412 U.S. 218, 247-48 (1973).

86. 395 U.S. 752 (1969).

87. *Id.* at 764-65.

88. This argument has not been cited in any case to date.

89. The use of "plants," infiltrators, and spot checks, in addition to citizen complaints, would seem to be reasonable alternatives. To avoid tort claims for goods in impounded automobiles, the court in *Cabbler v. Superintendent*, 374 F. Supp. 690 (E.D. Va. 1974), suggested seals upon the trunks and doors. *Id.* at 700. Such devices could also be used to provide internal security.

90. See *Boulet v. State*, 17 Ariz. App. 64, 495 P.2d 504 (1972), *vacated on other grounds*, 109 Ariz. 433, 511 P.2d 168 (1973); *State v. Gwinn*, 301 A.2d 291, 295 (Del. 1973).

91. 484 F.2d 990 (5th Cir. 1973).

92. Police arrested defendant upon a narcotics charge as he was boarding an airplane and impounded his luggage. A previous parcel of narcotics seized in relation to the same conspiracy had been rigged to explode if tampered with. An agent opened the defendant's luggage before it was placed in storage to negate the danger of an explosion and found evidence. *Id.* at 991. The court cited this danger of explosives alternatively in upholding the inventory. *Id.*

reasonable belief that the automobile contained a weapon.<sup>93</sup> Yet in *United States v. Gravitt*,<sup>94</sup> where the police unexpectedly found a veritable arsenal inside defendant's automobile,<sup>95</sup> the court used the rationale of the potential of theft and tort claims to support a conclusion of reasonableness, rather than an argument based upon the presence of explosives and weapons, to uphold the inventory.<sup>96</sup>

In the absence of some basis for a belief that a car contains weapons or devices capable of imminent explosion, it would seem that such risks are so remote that an infringement of fourth amendment rights is not warranted.<sup>97</sup> The fourth amendment should not bow for imagination alone.

### E. Summary

Although some courts have taken a contrary position,<sup>98</sup> inventories cannot be blanketly justified by the argument that they are not searches under the fourth amendment. Neither can the facts that an automobile is the area to be searched, nor that police have custody of the vehicle afford sufficient grounds for concluding that inventories are a fortiori reasonable searches. The validity of an inventory, as with any search, depends upon the reasonableness of the intrusion in light of all the circumstances. In most situations, the intention of the officers making the inventory to protect themselves and their fellow officers from tort claims, to protect the owner's property from theft, or to protect the public from dangerous objects which may be located in the impounded automobile, does not justify an intrusion into closed packages found inside the vehicle, or a search into areas of the car not in plain view. Only when the vehicle is so badly damaged that there is no protection at all to the items left inside, or when there is some basis for believing that it does contain dangerous objects, might an inventory be declared reasonable.

As the next section of this Comment will demonstrate, the Supreme Court, until recently had not in its decisions on automobile searches suggested or provided any reason to conclude that inventories are valid. How-

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93. See *Cady v. Dombrowski*, 413 U.S. 433 (1973), discussed in section III-B *infra*. In *State v. Lund*, 10 Wash. App. 709, 519 P.2d 1325 (1974), the defendant, arrested for driving with a suspended license, informed police that the vehicle contained a gun. *Id.* at 710, 519 P.2d at 1326. Since the car could not be locked securely and was located upon a route used by school children, the court upheld an inventory which revealed marijuana. *Id.* at 712, 519 P.2d at 1327.

94. 484 F.2d 375 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

95. During the inventory, police discovered a plastic explosive bomb, a carbine, a shot gun, and a loaded, fully-automatic rifle. 484 F.2d at 377.

96. *Id.* at 379-80.

97. Such a belief was found to exist in *Cady v. Dombrowski*, 413 U.S. 433 (1973), and the Court upheld a search based thereupon, although it was not considered an inventory. See notes 151 & 165 and accompanying text *infra*.

98. See note 114 *supra*.

ever, in *Cady v. Dombrowski*,<sup>99</sup> the Court may very well have presented the means to lower courts by which to uphold inventories in almost every situation.

### III. POSSIBLE SOURCES OF JUSTIFICATION FOR INVENTORY SEARCHES: SUPREME COURT DECISIONS

#### A. *Cases Prior to Cady v. Dombrowski*

For the purposes of this section, the pertinent automobile search decisions by the Supreme Court will be separated into two broadly descriptive sections: 1) The mobility rule, and 2) Noninvestigative intrusions. Supreme Court cases in this area are, for the most part, too complex and unclear to be fit into neat, analytical pigeonholes. However, these descriptive categories are of aid in developing two important lines of thought, which may provide a basis for concluding that inventories are reasonable searches.

##### 1. *The Mobility Rule.*

The so-called automobile exception was first enunciated in *Carroll v. United States*.<sup>100</sup> There, federal prohibition officers had probable cause to believe that a car, being operated upon a highway, contained contraband liquor. Without taking the time to secure a warrant, they stopped the car, searched, and discovered the illegal cargo inside the seats.<sup>101</sup>

At the time that this case reached the Supreme Court — 1925 — the automobile was a relatively new phenomenon. Recognizing the practical law enforcement problems presented by this technological innovation, the Supreme Court ruled that a warrantless search of a car might be made if there were probable cause to believe that it contained contraband, "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."<sup>102</sup> While the mobility factor justified the failure to obtain the warrant,<sup>103</sup> the requirement of probable cause defined the circumstances in which such a warrantless search would be reasonable.<sup>104</sup> This standard of probable cause and mobility for warrantless automobile searches is an attractive rule

99. 413 U.S. 433 (1973).

100. 267 U.S. 132 (1925).

101. *Id.* at 134-36.

102. *Id.* at 153.

103. The *Carroll* Court stated:

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made.

*Id.*

in that it is easily applied and fairly clear cut.<sup>105</sup> However, subsequent cases have tended to erode these requirements.<sup>106</sup>

In *Preston v. United States*,<sup>107</sup> the defendants were arrested for vagrancy and their car was impounded, taken first to the police station and then to a garage.<sup>108</sup> The Supreme Court held the search unreasonable because it could not be justified as one incident to arrest: "Once an accused is under arrest and in custody, then a search made at another place, without warrant, is simply not incident to the arrest."<sup>109</sup> In addition, the Court considered and rejected the contention that because there had been probable cause to believe the car was stolen both before and after it was impounded, the later search was valid.<sup>110</sup>

Perhaps more significant is the fact that the *Preston* Court looked to the general language of the fourth amendment rather than the more specific demands of *Carroll* in determining the validity of the automobile search in question.<sup>111</sup> Unfortunately, subsequent cases have read *Preston* narrowly by limiting it to a situation involving a search incident to arrest.<sup>112</sup>

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105. Had the search in *Carroll* been found unreasonable, the Court stated that the contraband seized would be inadmissible as evidence under the exclusionary rule and the officer would be liable for damages under a specific federal statute that existed at the time.

The exclusionary rule, unlike the warrant requirement, does not directly protect the privacy interests of the individual. The warrant requirement prevents searches which would unreasonably intrude on an individual's privacy interests. The exclusionary rule, on the other hand, is merely a remedy that can be used when such an unreasonable search uncovers evidence or contraband. If nothing incriminating is found, the aggrieved individual may have a tort action against police, in the absence of a specific statute, under the implied right of action for breaches of the fourth amendment which was announced in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). In general, however, this remedy has proved ineffective. See, e.g., Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243, 269-72 (1973). Also it is conceivable that what is found in a search may influence a court's judgment of whether or not there was probable cause for the search.

106. It was ruled that an automobile did not have to be in motion at the time it was seized. See *Husty v. United States*, 282 U.S. 694 (1931) (engine running but car not in motion); *Scher v. United States*, 305 U.S. 251 (1938) (seizure just after defendant parked and exited his auto). More recent cases have stretched these concepts to the breaking point. See notes 117-21 and accompanying text *infra*.

107. 376 U.S. 364 (1964).

108. *Id.* at 365.

109. *Id.* at 367, citing *Agnello v. United States*, 269 U.S. 20, 31 (1925).

110. The Court stated:

Here, we may assume, as the Government urges, that either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came upon the scene. But this does not decide the question of the reasonableness of a search of a later time and at another place.

376 U.S. at 367-68.

111. "But even in the case of motor cars, the test still is, was the search unreasonable." *Id.* at 367.

112. See notes 116, 130, and accompanying text *infra*. Finally, in *Cady v. Dombrowski*, 413 U.S. 433 (1973), *Preston* was explicitly limited. See note 156 and accompanying text *infra*. But see *Coolidge v. New Hampshire*, 403 U.S. 433 (1971), where four members of the Court read *Preston* broadly to preclude the warrantless search of a motor vehicle at another time and place, although founded upon probable

In the next relevant Supreme Court case, *Chambers v. Maroney*,<sup>113</sup> police had stopped defendant's car and arrested him as a robbery suspect. The car had been taken to the station where a search revealed evidence.<sup>114</sup> Initially, the Court noted that probable cause to search the auto for guns and stolen money had existed at the time of the initial stop,<sup>115</sup> and upon this basis distinguished *Preston* as a case concerned with search incident to arrest.<sup>116</sup>

Upholding the warrantless search, the *Chambers* Court stated:

For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.<sup>117</sup>

This passage appears at first to be merely a restatement of the *Carroll* doctrine — with probable cause, police may stop a moving vehicle and make an immediate search without a warrant — with the addition that probable cause to believe that evidence of a crime, rather than contraband, is located in the vehicle will provide sufficient justification for a search. But according to Justice White, the author of the majority opinion in *Chambers*, "moving" meant potentially movable<sup>118</sup> and "immediate" meant sometime soon after the car was impounded and removed to the station-house.<sup>119</sup> Only upon this basis was it possible for the Court to find that defendant's automobile was mobile even after impoundment.<sup>120</sup> Thus, by

cause. *Id.* at 457 (plurality opinion, Stewart, Douglas, Brennan, and Marshall, J.J., joining).

113. 399 U.S. 42 (1970).

114. *Id.* at 44.

115. *Id.* at 48.

116. *Id.* at 50. Unlike *Preston*, the police in *Chambers* had probable cause to believe the car contained evidence or contraband. *Id.* at 48. This distinction, apparently, allowed the *Chambers* Court to justify a search at another time and place. *Id.* at 52.

117. *Id.* at 52.

118. See *Coolidge v. New Hampshire*, 403 U.S. 443, 525-27 (1971) (White, J., dissenting).

119. In *Chambers*, the "immediate" search took place after the car was towed to the station house — a delay of indeterminate length. However, Mr. Justice White noted in a subsequent decision that *Chambers* "contemplated some expedition in completing the searches so that the automobiles could be released and returned to their owners." *Coolidge v. New Hampshire*, 403 U.S. 443, 523 (1971) (White, J., dissenting). Justice White indicated that since the police retained defendant's car in custody for over a year, the search in *Coolidge* was not sufficiently immediate under the rule of *Chambers*. *Id.* at 523.

120. 399 U.S. at 52. There are certain inconsistencies to the normal interpretation of mobility. One does not search a vehicle while it is moving, obviously, but only after it has been stopped. If one were to follow logically the rationale for exempting the automobile search from the warrant requirement, once an automobile has been stopped, or seized, by police, it is no longer mobile, and hence a warrant should be obtained. This is, apparently, the logical inconsistency which sparked Justice White's redefinition of "immediacy" in *Coolidge v. New Hampshire*, 403 U.S. 443, 524-27 (1971) (White, J., dissenting).

redefining the terms used in the traditional moving vehicle exception, the *Chambers* Court significantly increased the number of situations and expanded the time period within which a vehicle may be searched without a warrant.<sup>121</sup>

The final case to be considered in this category hardly clarified the issues raised in the previous automobile cases. After the defendant had been arrested and his family moved to another town, police in *Coolidge v. New Hampshire*<sup>122</sup> seized defendant's automobile from his home, removed it to the police station, and searched it without a valid warrant.<sup>123</sup> In a split decision, the Supreme Court ruled that absent exigent circumstances, police are required to obtain a warrant before seizing and searching a vehicle.<sup>124</sup> The plurality distinguished *Chambers* as having been a case involving a warrantless search with probable cause *given a valid seizure* at another time and place — the issue in *Coolidge* was characterized as being one of the *validity of the warrantless seizure*, and subsequent search of an unattended automobile upon private property.<sup>125</sup> In view of the closeness of the decision and the altered personnel of the Supreme Court,<sup>126</sup> it is questionable what, if any, limitation *Coolidge* has engrafted upon the expanded mobility rule enunciated in *Chambers*.<sup>127</sup>

Arguably, the mobility requirement has become sufficiently attenuated or fictionalized under *Chambers* to include the inventory search of an impounded automobile. However, *Chambers* requires probable cause to believe the vehicle contains evidence or contraband. Since the inventory procedure is inconsistent with the presence of probable cause, this line of Supreme Court cases does not support the inventory search.

121. This expansion of the mobility rule can be criticized because the practical exigencies justifying the search in *Carroll v. United States*, 267 U.S. 132 (1925) (*see* notes 102-03 and accompanying text *supra*) are not present when a vehicle is in police custody. If police were permitted to retain such a vehicle until a warrant were applied for, dual interests would be served — evidence or contraband would be preserved while the owner's privacy interests would be protected. Should the owner value his time more than his privacy, he could consent to the search.

122. 403 U.S. 443 (1971).

123. *Id.* at 446-48. The Court declared that although the search warrant had been issued by a justice of the peace, it had not been issued by a neutral and detached magistrate because the issuer was also the chief investigative officer and prosecutor. *Id.* at 453.

124. Mr. Justice Harlan reluctantly concurred with the four-man plurality upon this point while noting his desire to overthrow the exclusionary rule. *Id.* at 491-92 (Harlan, J., concurring).

125. *Id.* at 463 n.20.

126. Mr. Justice Rehnquist took Mr. Justice Harlan's place on the Court. It should be remembered that Mr. Justice Harlan had concurred with the plurality in *Coolidge*.

127. The contention was made in *Coolidge* that the car was still mobile although the owner was under arrest, his family was several miles away, and officers were guarding the automobile, because someone who possessed keys could slip by the guards and drive away. The plurality replied, "We attach no constitutional significance to this type of mobility." 403 U.S. at 461 n.18.

## 2. *Noninvestigative Intrusions*

A second line of Supreme Court cases has involved searches or intrusions which were intended for purposes other than discovery of evidence or contraband. Although it was not controlling, police custody of the vehicles seemed to be a relevant factor in these decisions and therefore may have some bearing upon the inventory issue.

*Cooper v. California*<sup>128</sup> involved a defendant who was arrested upon a narcotics charge as he was about to enter his automobile. The vehicle was seized as evidence pursuant to a forfeiture statute.<sup>129</sup> The search, which occurred one week after the seizure, was upheld.<sup>130</sup> The Court noted that although lawful custody does not create the right to search, "[t]he reason for and nature of the custody may constitutionally justify the search."<sup>131</sup> The apparent holding was that a search is reasonable if conducted for purposes relevant to the offense for which the defendant was arrested (narcotics), the grounds upon which the car was impounded (transporting narcotics), and the purpose for which it was being held (as evidence in a forfeiture proceeding).<sup>132</sup>

Apparently referring to the possibility of tort liability or physical injury, the Court stated, "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."<sup>133</sup> Avoiding the contention that a warrant should have been obtained, the Court declared that the issue was the reasonableness of the search rather than the opportunity to obtain a warrant.<sup>134</sup>

128. 386 U.S. 58 (1967).

129. *Id.* at 60. Law of June 23, 1955, ch. 1209, § 2, [1955] Cal. Stats. 2224 (repealed 1967), authorized any officer making a narcotics arrest to seize any vehicle used to conceal, transport, sell, or facilitate the possession of narcotics and required that such a vehicle be held as evidence until forfeiture or release. *Id.*

130. 386 U.S. at 62. The *Cooper* Court distinguished *Preston* upon the basis that in the latter case, the police had held the defendant's car gratuitously rather than as required by law. *Id.* at 61.

131. *Id.*

132. *Id.*

133. 386 U.S. at 61-62.

134. *Id.* at 62, quoting *United States v. Rabinowitz*, 399 U.S. 56, 66 (1950). The precise language of *Rabinowitz* quoted was, "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.* However, *Rabinowitz* was overruled by *Chimel v. California*, 395 U.S. 752 (1969). In the process, the *Chimel* Court rejected the passage from *Rabinowitz* relied upon in *Cooper*, stating that the *Rabinowitz* argument was "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct and not on considerations relevant to Fourth Amendment interests." 395 U.S. at 764-65.

This rejection was emphasized by Mr. Justice Powell writing for the majority in *United States v. United States District Court*, 407 U.S. 297 (1972). Referring specifically to the quotation from *Rabinowitz*, the Court said:

Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures," the definition of "reasonableness" turns, at least in part, on the more specific commands of the warrant clause. . . . The warrant clause of the Fourth Amendment is not dead language. . . . It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an im-



*Cooper's* primary significance derives from the fact that the Supreme Court allowed a warrantless search without probable cause of an immobilized vehicle. Since the self-protection and custodial interests of police were emphasized, it is possible to interpret *Cooper* as allowing searches whenever police have a right to possess a vehicle.<sup>135</sup> However, such a broad reading ignores the fact that the nature of the custody in *Cooper* was somewhat unique. There, the automobile was held as *evidence*, subject to *forfeiture* and *sale* by the state. These circumstances differ quantitatively and qualitatively from those of a vehicle impounded for the convenience of the owner, a parking violation, or the like.<sup>136</sup> Recognizing this difference, the Supreme Court apparently narrowed its holding, perhaps to the facts of the case.<sup>137</sup> As a result, *Cooper* cannot be said to justify the inventory procedure although it arguably did recognize the type of custodial and self-protection interests that are sometimes used to uphold inventories.<sup>138</sup>

Subsequent to *Cooper* the Supreme Court narrowly avoided the inventory issue although presented with a factual situation in which it might have attempted to give some direction to the lower courts to aid them in resolving the question. In *Harris v. United States*,<sup>139</sup> police made an inventory search of a car impounded as evidence pursuant to a police regulation. Finding nothing of significance during the inventory, the officer opened another door in order to roll up the window and lock the door. During this second procedure, evidence was discovered in the doorjamb.<sup>140</sup> The

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portant working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.

*Id.* at 315-16, quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

As a result, it can be argued that *Cooper* is of questionable validity since the justification used by the Court for not requiring a warrant was disapproved by subsequent decisions. However, the Court has done nothing to indicate that it would agree with such a contention.

It should be noted that the relevant quotation from *Rabinowitz* has taken on a life of its own in the mind of Mr. Justice White. He has cited this passage affirmatively in *United States v. Edwards*, 415 U.S. 800, 807 (1974), and *Coolidge v. New Hampshire*, 403 U.S. 443, 522 (1971) (dissenting opinion).

135. See Comment, *The Inventory Search of An Impounded Automobile*, 48 CHI.-KENT L. REV. 48, 52-53 (1971).

136. The interest of police in searching a vehicle under the circumstances of *Cooper* may be greater than in other fact situations. In contrast to the vehicle impounded for a parking violation, an automobile seized under a forfeiture statute is evidence; it is likely to remain in police custody for a substantial period and may, ultimately, be sold by the state.

137. See note 132 and accompanying text *supra*.

138. It has also been suggested that *Cooper* cannot apply to the inventory situation because in the latter, police cannot deny possession to the owner. Comment, *supra* note 3, at 848.

139. 390 U.S. 234 (1968) (per curiam).

140. *Id.* at 235-36. The District of Columbia police regulation required a thorough search of the vehicle's interior and the removal of all valuables. The Court of Appeals, whose view the Supreme Court accepted, described the crucial part of the factual situation as follows:

The arresting officer testified that he went out immediately to the car for two purposes. One was to inventory its contents as required by the regulation, and

Supreme Court ruled that the validity of the inventory was not at issue since no evidence was found during the inventory, stating:

The admissibility of evidence found as a result of a *search under the police regulation* is not presented by this case. . . . [T]he discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.<sup>141</sup>

Thus, police, as a protective measure, may roll up the windows and lock the doors of impounded automobiles and such a procedure will not be considered a search. Significantly, this passage could also be read to indicate that the Court regarded an inventory as a search within the meaning of the fourth amendment.<sup>142</sup>

It remains to be seen whether or not this narrow rule can be expanded to include the greater intrusion of the inventory search which is, ostensibly for protective purposes. Arguably, the Court's justification of the intrusion in *Harris* could be read as validating "protective" intrusions of unlimited scope, such as the inventory. However, such a result would not only infringe upon fourth amendment interests,<sup>143</sup> it would also conflict with the *Harris* Court's apparent intention. It is submitted that had the Court intended that *Harris* be interpreted as approving the inventory search, it would not have separated the inventory from the procedure in which the evidence was found. Rather it would have regarded locking the doors as an aspect of a general course of conduct, that being the inventory search.<sup>144</sup> Thus, *Harris* should be read merely as the application of the plain view doctrine<sup>145</sup> to a method of protecting property in police custody that involved minimal intrusion upon the individual's privacy interests.

the other was to roll up the windows because it was raining. Accomplishment of the former purpose was begun by opening the door on the driver's side of the car; and a complete examination of the interior of the car was made through, and by means of, this mode of entry. Having completed this examination, the officer then went around to the other side of the car for the sole purpose of rolling up the windows. When he opened the right front door for this purpose, there came into his view a registration card which had been lying on the door jamb concealed by the closed door.

*Harris v. United States*, 370 F.2d 477, 478 (D.C. Cir. 1966) (per curiam).

141. 390 U.S. at 236 (emphasis added).

142. See *Cabbler v. Superintendent*, 374 F. Supp. 690, 697 (E.D. Va. 1974), where the court read the passage quoted from *Harris* (see text accompanying note 141 *supra*) as a refusal to reach the question of the validity of the inventory. On the other hand, the *Harris* Court may have been stating that no search at all was involved in the case, implying that the inventory was not a search. It is submitted, however, that the Court would have made such a position clear, especially since it would have been able to uphold the intrusion on that basis rather than the limited grounds chosen by the Court.

143. See Section II *supra*.

144. See *Harris v. United States*, 370 F.2d 477, 480 (D.C. Cir. 1966) (Wright, J., dissenting).

145. The *Harris* Court stated that the officer had lawfully opened the door and the evidence was "plainly visible." 390 U.S. at 236.

In *Harris* and *Cooper*, the Supreme Court allowed warrantless intrusions of varying scope without probable cause into vehicles held in police custody as evidence. As justifications for these decisions, the Court cited the fact of custody, the need to protect the property of the owner, and the self-protection interests of police. These general propositions would seem to support the inventory search. However, this line of cases can be distinguished on three bases: 1) the holdings in both *Harris* and *Cooper* were narrow and carefully circumscribed;<sup>146</sup> 2) the type of custody which allowed an intrusion of unlimited scope in *Cooper* does not exist in most inventory search cases;<sup>147</sup> 3) the interest of protecting private property in impounded automobiles, cited in *Harris*, allowed an intrusion in that case much more limited in scope than that involved in the inventory procedure.<sup>148</sup>

#### B. *Cady v. Dombrowski*<sup>149</sup> and its Impact upon the Inventory Issue

By a rather narrow reading of the facts and a significant extension of the law, the Supreme Court, in *Cady v. Dombrowski*, was able to uphold a warrantless search of an immobile automobile, despite the lack of probable cause and the fact that the search was not incident to the defendant's arrest. In the process, the Court reinterpreted several automobile search cases, greatly limited another, created a new constitutional distinction, and, it would seem, laid a firm basis for inventory searches if not endorsing them sub silentio.

Initially, the fact situation of *Dombrowski* will be examined in order to demonstrate the relation of this case to the inventory issue. Second, the *Dombrowski* Court's treatment of previous automobile cases and its own analysis of the facts will be explored in order to determine the possible consequences for the inventory issue.

In *Dombrowski*, the defendant crashed his rented car into a bridge abutment near West Bend, Wisconsin. Local police were summoned and the defendant informed them that he was a Chicago policeman. The defendant was subsequently arrested for drunken driving and his disabled car was towed to a privately owned service station outside of town. After taking defendant to a hospital, where he lapsed into an unexplained coma, police drove to the service station to which defendant's car had been towed. A search of defendant's car revealed evidence in the trunk which led to his conviction for murder.<sup>150</sup> As the Court noted:

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146. See notes 132 & 141 and accompanying text *supra*.

147. See note 129 and accompanying text *supra*.

148. See note 141 and accompanying text *supra*.

149. 413 U.S. 433 (1973).

150. 413 U.S. at 435-37. Inside the defendant's truck police found clothing, a floor mat, and a towel covered with blood. Confronted with those items defendant, after consulting with counsel, revealed the presence of a body at a nearby farm. Several of the items found in defendant's trunk connected him with the killing. Defendant was convicted of first degree murder upon circumstantial evidence. *Id.* at 437-39.

The purpose of going to the Thunderbird, as developed on the motion to suppress, was to look for respondent's service revolver. Weiss [the West Bend policeman] testified that respondent did not have a revolver when he was arrested, and that the West Bend authorities were under the *impression* that Chicago police officers were required to carry their service revolvers at all times. He stated that the effort to find the revolver was 'standard procedure in our department.'<sup>151</sup>

It would seem that this standard procedure was actually an inventory search.<sup>152</sup> But because of the difficulties in considering the facial validity of the inventory procedure the Court, in effect, considered the practice as applied to the particular situation. Thus, the issue became whether the search of an automobile under police control for a revolver was a standard procedure "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands" was reasonable.<sup>153</sup>

151. *Id.* at 437 (emphasis added). The officer had merely a suspicion or belief that the auto contained a gun. *Id.* at 436-37. Since the defendant was a policeman, it would not necessarily have been against the law for him to have possessed a gun.

152. The Supreme Court neither accepted nor rejected this contention. Rather, it mixed together two factors: 1) the search was part of a standard procedure of West Bend police, *id.* at 443; 2) the searching officer had the specific intent to seek a revolver which he suspected was in defendant's rented auto, *id.* at 437, 433. It is possible that the Court declined to consider the inventory issue squarely because these factors are in partial conflict. On the one hand, the general justification for an inventory is that of seeking and protecting valuables rather than searching for evidence or contraband (*see* note 7 and accompanying text *supra*); the local officer in *Dombrowski* was not seeking valuables in order to protect them. Yet neither was he searching for evidence or contraband since the defendant, a policeman, was authorized to possess the revolver. Thus, if the Court had labelled it an inventory, it would have had to consider not only the inventory principle, but also a refinement or hybrid form of the principle.

While it emphasized the subjective motivations of the searching officer under the fact situation presented, the Court was extremely vague about the nature, purpose, and scope of the "standard procedure" which the officer was following. Presumably, this general procedure was not limited to protecting the public against the weapons of drunken Chicago policemen who wreck their cars. Possibly, the procedure was one of searching cars suspected of carrying firearms or explosives as a means of physically protecting the storage bailee and the public. *See* notes 82-89 and accompanying text *supra*. But such an obvious point in favor of the procedure would have been explicated, presumably, in at least one of the four published opinions which the case yielded along its way through the state and federal courts. *See* Cady v. Dombrowski, 471 F.2d 280 (7th Cir. 1972), *rev'd*, 319 F. Supp. 530 (E.D. Wis. 1970); State v. Dombrowski, 44 Wis. 2d 486, 171 N.W.2d 349 (1969).

The Supreme Court relied heavily upon the Wisconsin Supreme Court's finding of fact that the search was part of a standard procedure:

Although here there was no police regulation [requiring an inventory for valuables of all impounded cars] similar to the one in *Harris*; Officer Weiss did testify that it was "standard procedure" in his department to look in a car, being held like the appellant's, for the service revolver. *This would be a reasonable precaution taken to protect the suspect's property which might be in the car.* State v. Dombrowski, 44 Wis. 2d at 496, 171 N.W.2d at 354 (emphasis added). The state court went on to hold that the procedure involved — in effect an inventory — was not a search for purposes of the fourth amendment. *Id.* at 496-97, 171 N.W.2d at 354-55.

153. The *Dombrowski* Court stated that in resolving this issue, it had to determine whether the search was unreasonable solely because the local officer had not pre-

The *Dombrowski* Court began its analysis with the observation that there is a wide range of noninvestigative situations in which local police have contact with automobiles, labelling them "community caretaking functions" which are unrelated to duties connected with criminal acts.<sup>154</sup> As a result, according to the Court, there is a "constitutional difference between searches of and seizures from houses and similar structures and from vehicles" due to the mobility of automobiles and the fact that frequent, noncriminal contact with vehicles by the police often results in the discovery of contraband and evidence in plain view.<sup>155</sup>

In this context, the Court considered its prior automobile search cases in relation to the instant factual situation. First, the Court explicitly limited the holding of *Preston*, upon which the defendant-respondent had relied.<sup>156</sup> The Court believed that both *Cooper* and *Harris* were dispositive of the issues.<sup>157</sup> Focusing upon the purposes of the intrusions in these cases, rather than upon their scope or necessity, the Court stated:

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viously obtained a warrant," and if not unreasonable in this sense, was the resulting warrantless search unreasonable. 413 U.S. at 442. In making these determinations, the Court also noted that two facts should be emphasized — police had exercised a form of custody over the automobile and the search was standard procedure. *Id.* at 442-43.

154. *Id.* at 441.

155. *Id.* at 442, citing *United States v. Biswell*, 406 U.S. 311 (1972) (emphasis added). Because of the mobility of automobiles upon the open highway, the Supreme Court has created a constitutional exception to the warrant requirement. See notes 100-05 and accompanying text *supra*. By using the adjective "constitutional," and equating the caretaking duties of police with the mobility exception, the *Dombrowski* Court suggested a new constitutional exception to the warrant requirement for "care-taking" intrusions.

156. According to Justice Rehnquist:

It would be possible to interpret *Preston* broadly, and to argue that it stands for the proposition that on those facts there could have been no constitutional justification advanced for the search. But we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest.

*Id.* at 444.

The *Preston* Court had stated that the search incident to arrest "is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of a crime . . ." 376 U.S. at 366 (emphasis added). It is arguable that in the above quotation from *Dombrowski* the Court noted these examples and implied that there were other justifications for a search incident to arrest. This interpretation of *Dombrowski* is supported by the fact that the Court therein relied upon two cases in which the *Dombrowski* Court asserted that police were searching neither for evidence nor weapons but rather sought to protect themselves or the owner's property, *Harris* and *Cooper*. 413 U.S. at 445-48. Therefore, it could be argued that these other justifications for a search incident to an arrest include the protection of private property and police interests which could be safeguarded by an inventory search. Such a justification would necessarily extend beyond the time-place limitation of *Preston* and the personal effects limitation of *United States v. Robinson*, 414 U.S. 218 (1973). However, this extension might be justified by the quasi-administrative nature of the procedure. See *Adams v. Williams*, 407 U.S. 143 (1972), in which a police officer arrested an individual for unlawful possession of a revolver and apparently searched the entire car, finding contraband. *Id.* at 145. The Court upheld the search of the

In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cooper* it was to guarantee the safety of the custodians. Here the justification, while different, was as immediate and constitutionally reasonable as those in *Harris* and *Cooper*: concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle.<sup>158</sup>

It should be noted at this point that the Court's use of *Harris* as an automobile search case is questionable. In *Harris*, nothing was found in the inventory search, the validity of which was therefore not at issue.<sup>159</sup> Moreover the Court ruled that the officer's action of opening the door in order to roll up the windows and lock the car was not a search, but merely a procedure taken to protect the car.<sup>160</sup> Thus, the use of *Harris* to support the extensive search in *Dombrowski* seems inappropriate for comparative purposes. One explanation is that the Court has reinterpreted *Harris* as involving evidence found in plain view during an inventory search.<sup>161</sup>

In any event, the Court concluded that in the three factual situations presented in *Harris*, *Cooper*, and *Dombrowski* — noninvestigative intrusions to protect the automobile owner's property, the safety of the custodians of the vehicle, and the safety of the general public from the use of dangerous weapons stolen from an automobile — a vehicle could be searched without a warrant.<sup>162</sup> Significantly, these three justifications are among those cited in support of inventories; consequently an inventory could be considered a "caretaking search"<sup>163</sup> for which no warrant would be required.

Having determined that a warrant was not required, the *Dombrowski* Court faced the issue of the general reasonableness of the search under the fourth amendment. However, it was evident that once fitted within the

158. *Id.* at 447.

159. See text accompanying note 140 *supra*.

160. See text accompanying note 141 *supra*.

It should also be noted that the *Dombrowski* Court emphasized the fact that the search in *Cooper* was to safeguard the police who were holding the vehicle. See text accompanying note 158 *supra*. However, this factor was mentioned only in passing by the *Cooper* Court and was not the subject of extensive discussion. See text accompanying note 133 *supra*.

161. The *Dombrowski* Court described the fact situation of *Harris* in such a way as to give one the mistaken belief that the evidence therein had been found in an inventory. In essence, the Court stated that an inventory took place, that evidence was found, and that the evidence was ruled admissible without noting that the evidence had been found in a separate procedure. 413 U.S. at 445. While the Supreme Court did not make this distinction overwhelmingly clear in its per curiam *Harris* opinion, a close reading will reveal that to be the basis of the decision. See notes 139-45 and accompanying text *supra*. In addition, there can be little doubt upon the issue when the opinion is read in conjunction with that of the court it affirmed, *Harris v. United States*, 370 F.2d 477 (D.C. Cir. 1966) (per curiam). As a result, it would appear that the present Supreme Court is inclined toward rewriting *Harris* to point in new directions.

162. 413 U.S. at 447-48. The Court also referred to its previous comment about the difference between cars and houses. *Id.* See text accompanying note 155 *supra*.

163. The *Dombrowski* Court used this term in describing the search for the weapon

new exception to the warrant requirement, there was little doubt as to the ultimate reasonableness of the search. With little consideration of such factors as the alternative methods of protecting the vehicle that were available,<sup>164</sup> or the validity of the searching officer's belief that a revolver was located in the defendant's car, the Court simply stated:

Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.<sup>165</sup>

The factor which enabled the *Dombrowski* Court to uphold a warrantless search of an immobilized vehicle without probable cause was, apparently, the quasi-administrative<sup>166</sup> nature of the procedure. This would explain the Court's emphasis of the *purpose* of the procedure while generally ignoring its necessity and scope. Such an analysis is also supported by the *Dombrowski* Court's reliance upon *Harris* and *Cooper*, both of which involved intrusions for noninvestigative, protective purposes.

It has been contended that warrants should not be required in this quasi-administrative area of police procedure since they would be impossible to obtain.<sup>167</sup> Stated more clearly, the argument recognizes a public need, arising from other than the criminal law, which would require an intrusion into privacy interests protected by the fourth amendment. Since the warrant procedure is geared to probable cause of a crime, police would be unable to fulfill this public need through the warrant requirement.<sup>168</sup> However, the existence of a public need does not necessarily require an exception to the warrant requirement.<sup>169</sup> Moreover, it may be possible to

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164. While the Court mentioned the possibility of posting a police guard in metropolitan areas where manpower might be available, this observation appeared to pertain only to the Court's consideration of the warrant issue. *Id.* at 447. Even if the Court was speaking of reasonableness in general, it pursued this issue no further except to state, "The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id.*, citing *Chambers v. Maroney*, 399 U.S. 42 (1970).

165. 413 U.S. at 448.

166. This term is used in a descriptive, rather than technical manner. In essence, several cases seem to suggest that different treatment is accorded intrusions for purposes other than that of searching for evidence or contraband. These other purposes have included insulation from tort claims (*see* notes 57-68 and accompanying text *supra*), protection of property (*see* notes 69-87 and accompanying text *supra*) and public safety (*see* notes 90-97 and accompanying text *supra*). Since the objective is not to investigate crime but the result may be seizure of contraband or evidence, these intrusions may be fairly described as quasi-administrative.

167. Comment, *supra* note 3, at 850-51. *See Mozzetti v. Supreme Court*, 4 Cal. 3d 699, 711, 484 P.2d 84, 92, 94 Cal. Rptr. 412, 420 (1971).

168. Comment, *supra* note 3, at 851.

169. In relation to administrative housing inspections, the Court stated in *Camara v. Municipal Court*, 387 U.S. 523 (1967):

The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. For example, to say that gambling raids may not be made at the discretion of the police without a warrant is not necessarily to say that gambling raids may never be made. In assessing

obtain administrative search warrants based upon reasonable administrative or legislative standards.<sup>170</sup> Thus, there is an alternative to creating an exception to the warrant requirement in order to accommodate the factual situation of *Dombrowski* or that of the inventory search of an impounded vehicle.

The Court's conclusion that the warrantless search was reasonable may also be criticized. Despite the Court's finding that the automobile was vulnerable to vandals,<sup>171</sup> the fact situation of *Dombrowski* was not particularly compelling. The search for the gun was made after 2 a.m. in the locked trunk of a vehicle stored at an isolated, rural service station.<sup>172</sup> If these facts made the search reasonable, it would be hard to imagine a situation in which an automobile trunk could not be searched, given a suspicion that it contained a weapon. It might be argued that because the car had been involved in an accident there was an additional reason to search. An automobile which has been in an accident may require a greater amount of protection if its windows and locks were broken. Such was not the case in *Dombrowski*, at least as far as the trunk was concerned, because the Court noted that the trunk of the car had been locked before the searching officer opened it.<sup>173</sup> Therefore, the danger that someone would remove the gun from the trunk was not increased by the fact that an accident had occurred. Similarly, the danger does not seem to have been appreciably greater than that presented by a gun in the trunk of any car not under police control.

Therefore, the only substantial basis upon which the search could have been justified was the contention that once police had impounded the auto, they had a *duty*, whether from bailment law or otherwise, to protect defendant's goods from larceny and the public from dangers presented by some of these goods. Yet it does not seem that the police actually impounded the car. A private garage had towed and stored the car.<sup>174</sup> The Court said merely, "[T]he police had exercised a *form* of custody or control over the 1967 Thunderbird."<sup>175</sup>

As a result, there was no imminent danger to the public in *Dombrowski* from vandals poised to strip the deadly contents of a vulnerable automobile. Neither was there a bailee's duty in the police to protect the contents

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whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

*Id.* at 533, *citing* *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

170. *Id.* at 538. *See also* *Almeida-Sanchez v. United States*, 413 U.S. 266, 283 (1973) (Powell, J., concurring) (border searches).

171. *See* text accompanying note 165 *supra*.

172. 413 U.S. at 436-37.

173. *Id.* at 437.

174. *Id.* at 436.

175. *Id.* at 442-43 (emphasis added).



of the vehicle because they did not have possession.<sup>176</sup> If the Court could uphold a search under these circumstances, it is not a large step to validate the inventory process. The lone substantial factual distinction is the presence in *Dombrowski* of a reasonable belief that the automobile contained a weapon<sup>177</sup> — such a reasonable belief would not normally be present in the ordinary inventory search process. However, additional public interests which apparently arise when police actually impound a vehicle, such as the protection of the owner's property and the prevention of tort claims against police for conversion of goods inside such vehicles, might be adequate substitutes and, therefore, justify an inventory.

In addition, the *Dombrowski* Court's analysis of the law would also seem to support the inventory procedure.<sup>178</sup> The mitigating facts and limited holdings of *Harris* and *Cooper*<sup>179</sup> were largely ignored in *Dombrowski*. The Court seemed to reinterpret *Harris* and *Cooper* by emphasizing certain facts common to each case: 1) an immobilized vehicle was searched without probable cause; 2) the purpose of the intrusion was to protect the owner's property or the police in some fashion and not to seize evidence; 3) the evidence revealed by these intrusions was ultimately found admissible. The result, apparently, is a new exception to the warrant requirement for quasi-administrative intrusions into vehicles in police custody.

There is little question that the inventory search can be interpreted to fit within this exception. Several of the stated purposes of the inventory procedure — protecting private property, the police, and the public against weapons secreted inside impounded automobiles — have been accepted by the Court as meriting the exception.<sup>180</sup> In addition, it is likely that the inventory, as a quasi-administrative procedure used to protect various public interests, could be found reasonable under the rule of *Dombrowski*.

The Supreme Court thus approached the logical conclusion of a trend that began with *Cooper*, in which five justices ruled that a warrantless search without probable cause pursuant to a forfeiture proceeding was somehow more reasonable than a search for evidence.<sup>181</sup> With *Cooper* as a basis, successive innovations have followed easily. The Court has obscured the direction of and gaps in such reasoning by concentrating upon the reasonableness of various police practices and avoiding a consideration of the reasonableness of the resulting incursions into the privacy interests

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176. Since police did not have possession, they could not have been considered gratuitous or involuntary bailees. See note 57 *supra*.

177. 413 U.S. at 448.

178. Several courts have relied upon *Dombrowski* to uphold inventories. *State v. Gowons*, 109 Ariz. 521, 514 P.2d 443 (1973); *People v. Trusty*, — Colo. —, 516 P.2d 423 (1973); *St. Paul v. Myles*, 298 Minn. 298, 218 N.W.2d 697 (1974); *State v. Vigil*, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974); *State v. Lund*, 10 Wash. App. 709, 519 P.2d 1325 (Ct. App. 1974). But see *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973); *Cabblar v. Superintendent*, 374 F. Supp. 690 (E.D. Va. 1974).

179. See notes 131-37, 140-45 and accompanying text *supra*.

180. See text accompanying note 162 *supra*.

181. See notes 130-34 and accompanying text *supra*.

of the individual. Only by looking at one side of the coin has the Court been able to maintain the structure of a fourth amendment inquiry.

As an alternative, the trend of *Cooper*, as followed through *Dombrowski*, could be regarded as a reaction to the technological innovation and proliferation of the automobile. In *Carroll*, the Court created an exception to the warrant requirement because of the impracticality of obtaining a warrant for a moving vehicle.<sup>182</sup> Going beyond mere alteration in the factual circumstances in which an automobile search will be ruled reasonable under the fourth amendment, the Court could rule forthrightly that one has little or no right to privacy in his automobile.<sup>183</sup> Although *Katz v. United States*<sup>184</sup> is to the contrary, it is possible to regard the proliferation and necessity of automobiles in today's society plus the many "care-taking" functions of police in regard to automobiles as justifying such a result. Momentous as such a decision would be, it is a more logical explanation of the trend expressed in *Dombrowski* and the effect might not be significantly greater. When all cars can be inventoried for beneficent purposes, there will be no need for evidentiary searches.

#### IV. CONCLUSION

In *Cady v. Dombrowski*, the Supreme Court narrowly avoided the inventory search issue<sup>185</sup> while creating a sound legal basis for this type of procedure. To do this, the Court reinterpreted several cases,<sup>186</sup> and created, or at least formulated, a new exception to the warrant requirement<sup>187</sup> while spinning out of a less than compelling fact situation a cognizable public interest in the search.<sup>188</sup> In the process, the Court endorsed several of the justifications generally presented for inventory searches. While *Dombrowski* did not expressly validate inventory searches, it would be difficult to imagine a case that could have come closer.

Courts upholding inventory searches tend to consider this sort of standard operating procedure with a view toward determining whether or not it reasonably aids police in protecting property or avoiding claims for conversion of goods allegedly taken from impounded vehicles. They give scant consideration to the individual's fourth amendment interest of privacy in his personal effects — a factor which must be balanced against these other interests.<sup>189</sup> Even if one were to assume that general police interests in protecting property or avoiding tort claims weigh equally with the individual's right of privacy, a close analysis of the necessity for and scope of the inventory procedure must be undertaken.

182. See notes 100-05 and accompanying text *supra*.

183. See note 155 and accompanying text *supra*.

184. 389 U.S. 347 (1967). See notes 36-37 and accompanying text *supra*.

185. It is possible to conclude that the Court failed to rule upon the inventory issue only because it was presented in an awkward manner. See note 152 *supra*.

186. See notes 160-61 and accompanying text *supra*.

187. See notes 162-63 and accompanying text *supra*.

188. See notes 172-75 and accompanying text *supra*.

189. See notes 224-28 and 331-34 *supra*.

An examination of the policy bases behind inventory procedures reveals that in most situations an inventory search, especially one of unlimited scope, is not necessary to protect the owner's property, to insulate the police from tort claims, or to shield the public from explosives or weapons which may be secreted inside impounded automobiles.<sup>190</sup> In addition, the reasonableness of the inventory under the fourth amendment bears an inverse relationship with the scope of the search.<sup>191</sup>

In *Dombrowski* the Court brought a measure of order to the chaos of automobile searches. But it went far towards validating the inventory search — a procedure whose regulation is marked by catchword justifications as well as by the astounding lack of reflection which most courts have displayed in dealing with these justifications. Order has been achieved by imposing upon the area a simplistic analytical overlay which, it is submitted, ignores individual privacy interests. Although it appears unlikely, this trend must be reversed if the fourth amendment is to retain meaningful application to automobiles in the area of quasi-administrative intrusions into areas of a car not in plain view.

Robert M. Hall

## APPENDIX

- I. States where cases have consistently held inventory searches of areas not in plain view to be valid.

In the following cases, inventory searches have been recognized as valid under the fourth amendment since they were not merely subterfuges for warrantless searches but rather were legitimate means to protect the owner's property and to protect the police from false tort claims; *Boulet v. State*, 109 Ariz. 433, 511 P.2d 168 (1973), *vacating*, *Boulet v. State*, 17 Ariz. App. 64, 495 P.2d 504 (1972) (not necessary for police to have no hope or expectation of finding something incriminating in inventory); *People v. Trusty*, \_\_\_\_\_ Colo. \_\_\_\_\_, 516 P.2d 423 (1973) (interpreting *Cady v. Dombrowski*, 413 U.S. 433 (1973)); *Denson v. State*, 128 Ga. App. 456, 197 S.E.2d 156 (1973) (heroin found inside envelope); *State v. Undorf*, 210 Kan. 1, 499 P.2d 1105 (1972) (quoting with approval *United States v. Lipscomb*, 435 F.2d 795 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971)); *St. Paul v. Myles*, 298 Minn. 298, 218 N.W.2d 697 (1974) (basing decision primarily upon *Dombrowski*); *State v. Armstrong*, 149 Mont. 470, 428 P.2d 611 (1967) (possibly an alternative holding); *State v. Hock*, 54 N.J. 526, 257 A.2d 699 (1969), *cert. denied*, 399 U.S. 930 (1970) (alternative holding; *see also* *State v. Jones*, 122 N.J. Super. 585, 301 A.2d 185 (Dist. Ct. 1973)); *State v. All*, 17 N.C. App. 284, 193 S.E.2d 770 (1973), *cert. denied*, 414 U.S. 866 (1973); *State v. Vigil*, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974) (overruling *State v. Newrod*, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973)); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517 (1968); *Cabbler v. Commonwealth*, 212 Va. 570, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1073 (1972).

190. See section II-D *supra*.

191. See notes 33-34 and accompanying text *supra*.

Delaware adheres to the unusual rule that police may inventory closed areas of an automobile in police custody, but may not search closed parcels found therein. *State v. Gwinn*, 301 A.2d 291 (Del. 1973). Case law suggests, although it does not require, a similar rule in Oklahoma. In *Embree v. State*, 488 P.2d 588 (Ct. Crim. App. Okla. 1971), marijuana found by police in defendant's automobile was found inadmissible because the search warrant was invalid, the search was not incident to the arrest, there was no probable cause, the vehicle was no longer mobile, and the intrusion could not be justified as a police inventory, citing for the last proposition *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). However, in *Bennet v. State*, 507 P.2d 1252 (Ct. Crim. App. Okla. 1973), the court interpreted *Embree* as a mere search warrant case and limited the rule of *Mozzetti* to intrusions into closed parcels. *Id.* at 1254. The *Bennet* court went on to uphold an inventory which revealed marijuana under a floor mat and in the glove compartment. *Id.* at 1255. It has also been held by an Oklahoma court that an officer may not delegate his duty to make an inventory to a tow truck driver. *State v. Shorney*, 524 P.2d 69 (Ct. Crim. App. Okla. 1974). Recently, an inventory in which evidence leading to conviction was discovered in defendant's trunk was upheld as a reasonable search, the court citing *Bennet* and *Mozzetti*. *Fruit v. State*, 528 P.2d 331, 334 & n.3 (Ct. Crim. App. Okla. 1974).

Florida has been one of the more consistent advocates of the inventory process. *See Roush v. State*, 203 So. 2d 632 (Dist. Ct. App. Fla. 1967). However, in upholding inventory process, one Florida case contained extraneous overtones of search incident to arrest, *Gagnon v. State*, 212 So. 2d 337, 399 (Dist. Ct. App. Fla. 1968), while another seemed to suggest that police custody was a sufficient justification, *Knight v. State*, 212 So. 2d 900 (Dist. Ct. App. Fla. 1968). The limits placed upon the inventory search by its protective nature were overlooked in *Godbee v. State*, 224 So. 2d 441 (Dist. Ct. App. Fla. 1969). There the court upheld an inventory in which police broke the locks of a car impounded two days earlier and found stolen goods. *Id.* at 442. However, an inventory will not be allowed where it was performed against usual police practice. *State v. Volk*, 291 So. 2d 643 (Dist. Ct. App. Fla. 1974).

Anticipating the inventory issue in *Jackson v. State*, 243 So. 2d 396 (Miss. 1970), the court ruled that the process was valid when made as a good faith effort to protect property rather than to search for evidence. *Id.* at 399. The court went on to approve the admission into evidence of marijuana found above the sun visor and inside the air breather atop the carburetor, despite the unlikelihood that the latter location would be used to store valuables, although it remanded to the lower court upon other grounds for a new trial. *Id.* at 397. On appeal of the same case after retrial, the court was squarely presented with the inventory issue and upheld the intrusion. *Jackson v. State*, 261 So. 2d 126 (Miss. 1972).

An inventory search in Nevada was upheld in *Heffley v. State*, 83 Nev. 100, 423 P.2d 666 (1967), where the court noted that if police conduct indicated that their intention was exploratory, rather than protective, the search would be unreasonable. *Id.* at 103-04, 423 P.2d at 668. Subsequently, the defendant sought habeas corpus relief which was denied by the district court on the grounds that the search was valid as one incident to an arrest; the Ninth Circuit reversed upon this issue, noting that the inventory question was not pressed on appeal. *Heffley v. Hocker*, 420 F.2d 881, 885 n.8 (9th Cir. 1969). The Ninth Circuit's opinion was vacated and remanded by the Supreme Court to be considered in light of *Chambers v. Maroney*, 399 U.S. 42 (1970), *Hocker v. Heffley*, 399 U.S. 521 (1970) (per curiam), after which the Ninth Circuit affirmed the conviction. *Heffley v. Hocker*, 429 F.2d 1321 (9th Cir. 1970). Despite the irrelevance of these federal cases to the inventory issue, the Nevada courts have dealt with the Nevada Supreme Court's decision in *Heffley* in an inconsistent manner, sometimes appearing to doubt the validity of *Heffley*. *See Wright v. State*, 88 Nev. 460, 499 P.2d 1216 (1972); *Shepp v. State*, 87 Nev. 179, 484 P.2d 563 (1971); *Scott v. State*, 86 Nev. 145, 465 P.2d 620 (1970). The better interpretation is that *Heffley v. State*, 83 Nev. 100, 423 P.2d 666 (1967), is still good law in Nevada.

In Washington, an inventory to protect property against destruction and police against tort claims, rather than as a subterfuge for an exploratory search, was upheld

in *State v. Montague*, 73 Wash. 2d 381, 438 P.2d 571 (1968). The lower courts of that state have strained to uphold this procedure under less than compelling circumstances. See *State v. Patterson*, 8 Wash. App. 177, 504 P.2d 1197 (1973) (police completed inventory without finding anything, but then searched under dashboard after a pistol fell from beneath the dashboard when tow truck driver sat in driver's seat); *State v. Jones*, 2 Wash. App. 627, 472 P.2d 402 (1970) (search not valid as one incident to an arrest under *Chimel v. California*, 395 U.S. 752 (1962), but valid as an inventory). However, the automobile must be properly impounded for there to be an inventory, a requirement that is not satisfied when a car is parked in a legal parking space and the driver is arrested for an offense which is easily bailable, implying only a temporary absence from the car. *State v. Singleton*, 9 Wash. App. 327, 332-34, 511 P.2d 1396, 1399-1400 (1973). In addition, evidence obtained is inadmissible unless there has been a good faith attempt to find, list, and secure all of the personal property in the automobile, not just the property which is incriminatory. *State v. Gluck*, 83 Wash. 2d 424, 518 P.2d 703 (1974). In *State v. Lund*, 10 Wash. App. 709, 519 P.2d 1325 (1974), the defendant informed police that there was a gun in a car with broken locks which was parked on a route used by school children. *Id.* at 710, 519 P.2d at 1326. The court upheld the admissibility of marijuana found in the search for the gun, citing as controlling authority *Dombrowski*. *Id.* at 712, 519 P.2d at 1327.

In *St. Clair v. State*, 1 Md. App. 605, 232 A.2d 565 (Ct. Spec. App. 1967), the court suggested that an inventory might not be a search for purposes of the fourth amendment. *Id.* at 612, 232 A.2d at 469. *MacKall v. State*, 7 Md. App. 246, 255 A.2d 98 (Ct. Spec. App. 1969), interpreted *St. Clair* as holding that an inventory is not a search. *Id.* at 251, 255 A.2d at 101. However, an inventory is unreasonable if the car is parked safely and the driver's absence will be temporary since the danger of property loss is lessened. See *Dixon v. State*, 23 Md. App. 19, 327 A.2d 516 (Ct. Spec. App. 1974); *Kleinbart v. State*, 2 Md. App. 183, 234 A.2d 288 (Ct. Spec. App. 1967).

The Nebraska court ruled that an inventory is not a search for purposes of the fourth amendment, although the inventory must be justifiable as a bona fide inventory and not as an excuse for a warrantless search, in *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372, cert. denied, 399 U.S. 912 (1970). Police found gambling material in a vanity box located in the trunk and glove compartment of defendant's automobile. 185 Neb. at 46, 173 N.W.2d at 374.

In New York, the admissibility of a loaded pistol found inside a brief case contained in an illegally parked car was upheld in *People v. Sullivan*, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971). Initially, the court cited the necessity for a towaway program (noticeably skirting the issue of necessity for the inventory) apparently to infer that the procedure involved was somewhat different from that concerning cars held as evidence. *Id.* at 71, 272 N.E.2d at 465, 323 N.Y.S.2d at 946-47. Relying on a tentative draft of the MODEL CODE OF PRE-ARREST PROCEDURE (Code), the court ruled that the inventory was not a search. Using the Code's definition of "search," the court concluded that there must be a direct nexus between the inventory and an intent to prosecute in order for the intrusion to become a "search" under the fourth amendment. *Id.* at 77, 272 N.E.2d at 469, 323 N.Y.S.2d at 952, citing MODEL CODE OF PRE-ARREST PROCEDURE art. 1, § SS1.01, subd. [1] (Tent. Draft No. 3, 1970). Where the intent of an officer is to look for contraband, rather than to protect property, the intrusion is a search. *People v. Rivera*, 72 Misc. 2d 307, 399 N.Y.S.2d 82 (Crim. Ct. 1972).

In *State v. Dombrowski*, 44 Wis. 2d 486, 171 N.W.2d 349 (1969), police found evidence of a crime when they opened the trunk of a wrecked car in order to find the service revolver believed to be carried by the driver, a Chicago policeman. *Id.* at 493-94, 171 N.W.2d at 353. Noting that the standard procedure of police was to look in such automobiles to protect the owner's property (in effect an inventory), the court ruled that there had been no search within the meaning of the fourth amendment. *Id.* at 496-97, 171 N.W.2d at 354-55. Subsequent cases in this state have dealt with the inventory issue in an inconsistent manner. See *Soehle v. State*, 60 Wis. 2d 72, 82 & n.16, 208 N.W.2d 341, 347 & n.16 (1973) (inventory concept not applied to digital photography of facial features). See also *Warrick v. State*, 50 Wis. 2d

368, 184 N.W.2d 189 (1971); *Lopez v. State*, 53 Wis. 2d 662, 193 N.W.2d 874, *cert. denied*, 407 U.S. 923 (1972); *State v. McCarty*, 47 Wis. 2d 781, 177 N.W.2d 819 (1970).

## II. Jurisdictions tending to support the validity of inventory searches.

The District of Columbia courts have consistently recognized the rule that inventory searches of cars lawfully in police custody conducted with the purpose of protecting the owner's property and shielding the police from tort claims are reasonable under the fourth amendment. *Mayfield v. United States*, 276 A.2d 123, 124-25 (D.C. 1971); *Pigford v. United States*, 273 A.2d 837, 839-40 (D.C. 1971); *United States v. Pannell*, 256 A.2d 925, 926 (D.C. 1969). But just as consistently, these courts found the means to invalidate each inventory search case presented to them. In *Pannell*, the court ruled the inventory unconstitutional because there was no need to impound the car; defendant had been arrested for a minor traffic violation and the car had been legally parked. 256 A.2d at 926. Since the officer acted inconsistently with a protective intent in *Pigford*, the inventory was ruled exploratory in that case. 273 A.2d at 840. Even with a valid impoundment in *Mayfield*, the court ruled that the temporary absence caused by the minor traffic violation involved made the inventory unnecessary and unreasonable. 276 A.2d at 125.

In Kentucky, there is some case law to the effect that contraband found in a vehicle under police care is admissible under the fourth amendment. *Cole v. Commonwealth*, 201 Ky. 543, 257 S.W. 713 (1924); *Patrick v. Commonwealth*, 199 Ky. 83, 250 S.W. 507 (1923). But all subsequent interpretations of these cases have relegated them to the search incident to arrest area. *See, e.g., Commonwealth v. Phillips*, 224 Ky. 117, 5 S.W.2d 887 (1928).

In *People v. Willis*, 46 Mich. App. 436, 208 N.W.2d 204 (1973), the Michigan Court of Appeals noted "by way of dictum" that an inventory might not be a search in the constitutional sense and that even if it were a search, it was probably reasonable. *Id.* at 440-41, 208 N.W.2d at 206.

## III. States in which it has been held that inventories are unreasonable searches.

The court found that an inventory extending beyond items in plain view was unreasonable in *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). Overruling a series of lower court decisions, the California court held that police went far beyond what was necessary to protect the contents of defendant's suitcase and noted that mere custody of the car did not create a right to search it. *Id.* at 706-11, 484 P.2d at 88-91, 94 Cal. Rptr. at 416-19. The tort claim justification was dismissed upon the basis that police, as involuntary bailees, are obliged to exercise only slight care, "In no case is an inventory of items not within plain sight essential to safeguard the contents or to fulfill a 'slight' duty of care." *Id.* at 708-09, 484 P.2d at 89-90, 94 Cal. Rptr. at 417-18. An inventory is an unreasonable search even when made to protect the contents of an arrestee's automobile, which is to be left in a high crime district late at night after owner has requested that the vehicle and contents not be taken into custody. *People v. Miller*, 7 Cal. 3d 219, 496 P.2d 1228, 101 Cal. Rptr. 860 (1972).

It has been ruled unnecessary and therefore unreasonable in Oregon for police to make a protective inventory of a tackle box. *State v. Keller*, 265 Ore. 622, 510 P.2d 568 (1973), *rev'g*, 9 Ore. App. 613, 497 P.2d 868 (1972) and *overruling State v. Raiford*, 7 Ore. App. 421, 490 P.2d 1036 (1971). The Supreme Court's ruling in *Keller* appears to extend not only to closed packages, but also to areas not in plain view. *See State v. Walden*, 15 Ore. App. 259, 515 P.2d 407 (1973); *State v. Childers*, 13 Ore. App. 622, 511 P.2d 447 (1973).

## IV. State cases suggesting that inventory searches are invalid.

In Maine, a court declared an inventory to be a search and seemed to view the process with some disfavor, although it specifically reserved the issue of an inventory's reasonableness. *State v. Richards*, 296 A.2d 129, 138 n.8 (Me. 1972). In *State v.* Published by Villanova University Charles Widger School of Law Digital Repository, 1974

Eaton, 504 S.W.2d 12 (Mo. 1973), the Missouri court declined to uphold a search as an inventory, choosing instead probable cause as a basis of justification. *Id.* at 18-19. In the process, the Missouri court cited with approval *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973), the leading court of appeals case holding inventory searches violative of the fourth amendment. 504 S.W.2d at 19. *Lawson* also proved instructive to the court in *State v. Catlette*, \_\_\_\_ S.D. \_\_\_\_, 221 N.W.2d 25 (1974). There the court appeared to lean toward the position that only an inventory of areas in plain view is permissible. However, the court did not need to reach this issue since it found that the primary intent of the officer was to search for evidence rather than to protect property. *Id.* at \_\_\_\_, 221 N.W.2d at 28-29.

## V. United States Circuit Courts of Appeals with holdings upon the inventory issue.

### A. Fifth Circuit

Early cases within this jurisdiction are of a mixed and contradictory character. In a border search case, the court stated:

A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest.

*Haerr v. United States*, 240 F.2d 533, 535 (5th Cir. 1957) (dictum). Twelve years later, the Fifth Circuit ruled inadmissible evidence found during an inventory of an abandoned car of which the defendant denied ownership or knowledge. *Williams v. United States*, 412 F.2d 729 (1969). However, both *Haerr* and *Williams* have been isolated and by-passed by later decisions of the Fifth Circuit.

The germinal case of *United States v. Lipscomb*, 435 F.2d 795 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971), involved the inventory of a suitcase found in defendant's hotel room and an inventory of his car. The court found that police had a duty to take possession of goods in the hotel room and to inventory the contents of the suitcase for safekeeping. 435 F.2d at 799-80. Using a similar safekeeping rationale and citing another decision that permitted police to inspect the vehicle identification number of automobiles under certain circumstances, *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970) (en banc), the *Lipscomb* court upheld the automobile inventory as a protective, rather than exploratory, measure. 435 F.2d at 801.

*Johnson* allowed police to examine vehicle identification numbers, positing that the owner had no reasonable expectation of privacy as to his car's identification number. 431 F.2d at 441. Nothing was found in the car inventory in *Lipscomb* except the vehicle identification number, which indicated that the car was stolen. Since this revelation was arguably within the bounds of *Johnson*, it is possible to regard the *Lipscomb* court's discussion of automobile inventories as mere dictum. However, this argument has not been recognized by the Fifth Circuit.

In subsequent cases, the Fifth Circuit generally upheld the right of police to inventory closed areas of automobiles and sealed packages as a means of protecting the owners' property and the police from tort claims when the inventories are not used as subterfuges for evidentiary searches. *United States v. Ducker*, 491 F.2d 1190 (5th Cir. 1974); *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); *United States v. Kelehar*, 470 F.2d 176 (5th Cir. 1972); *United States v. Edwards*, 441 F.2d 749 (5th Cir. 1971); *United States v. Pennington*, 441 F.2d 249 (5th Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States v. Boyd*, 436 F.2d 1203 (5th Cir. 1971) (per curiam). *Cf. United States v. Grill*, 484 F.2d 990 (5th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974) (inventory of suitcase upon which IRS filed a lien held valid). In essence, the Fifth Circuit has taken the doctrine to its logical conclusion: the routine inventory of a lawfully impounded vehicle is a separate, alternative and complete exception to the warrant requirement and will be held reasonable under the fourth amendment unless exploratory intent is clearly proven.

It is submitted, however, that application of the inventory search doctrine within the Fifth Circuit has, at times, approached absurdity. *See Lowe v. Caldwell*, 367

F. Supp. 46 (S.D. Ga. 1973), in which the court found that police were justified in opening an envelope and reading the letter therein, in order to protect the defendant's property interest. *Id.* at 53. The court labelled "hair-splitting" the argument that police should have obtained a warrant before opening the envelope found in defendant's auto. *Id.* at 53 n.11.

### B. Eighth Circuit

Giving a narrow reading to *Dombrowski*, the court held inventory searches violative of the fourth amendment in *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973). In so doing, the *Lawson* Court considered various aspects and justifications of the inventory issue. First, the court rejected the argument that an inventory is not a search, stating that such a highly technical construction violated the spirit, if not the letter, of the law as expressed in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Camara v. Municipal Court*, 387 U.S. 523 (1967). 487 F.2d at 472. Next, it questioned the contention that an inventory gave police more protection against tort claims than other procedures involving less intrusion. *Id.* at 476. According to the court, the fact that the inventory was a routine practice, performed in accordance with a police regulation should be irrelevant. *Id.* at 475. The court recognized that the reasonableness of the procedure, as determined by a balancing of interests, should be the controlling element rather than the court's subjective view of reasonable police procedures. *Id.* at 477. As a result, the court held that in normal circumstances, an inventory search is not necessary to protect the owner's property from loss or the police from tort claims, and that, in any case, the procedure is usually an unreasonable intrusion upon the owner's fourth amendment right of privacy. *Id.*

VI. Federal circuits having no direct holding upon the question of inventory searches.

### A. First Circuit

The courts within this circuit have thus far avoided the inventory issue. At least one commentator has cited *Fagundes v. United States*, 340 F.2d 673 (1st Cir. 1964), for the proposition that an inventory to protect property inside an automobile is not a search, at least for purposes of the fourth amendment. Comment, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 849 & n.69 (1974). In *Fagundes* the officer noted evidence in plain view while attempting to protect the contents of a disabled car from rain pouring through a broken window. 340 F.2d at 674. Not commenting upon the officer's intrusion into the automobile, the court ruled that it was not a search for one to observe that which was in plain view. *Id.* at 676. Because there was no inventory and the evidence was in plain view, it is submitted that *Fagundes* is not authority for the proposition that an inventory is not a search. The resolution of the issues posed by a factual situation similar to that in *Fagundes* should be controlled by *Harris v. United States*, 390 U.S. 234 (1968), which held admissible evidence found while an officer was rolling up windows and locking doors of an automobile in police custody as a protective measure.

### B. Seventh Circuit

The court in *United States v. Ware*, 457 F.2d 828 (7th Cir.), *cert. denied*, 409 U.S. 888 (1972), ruled that the examination of a vehicle identification number was a mere check upon the identification of the car and not a search. 457 F.2d at 830. While purporting to distinguish *United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966), *Ware* effectively overruled this prior case. 457 F.2d at 829-30.

The significance of the vehicle identification number examination for the issues discussed in this Comment is that a court's disposition of the vehicle number issue tends to reflect its orientation in the general area of vehicle intrusions which are not necessarily evidentiary, but which may lead to prosecution depending upon what is found. However, the usefulness of the connection between inspection of a vehicle identification number and an inventory of the vehicle is skewed by two factors, each cutting in an opposite direction. First, theoretically a check of the vehicle identifica-



tion number is more consciously aligned with a possible violation of the law than an inventory search. On the other hand, viewing the vehicle identification number would seem to be quantitatively, if not qualitatively, a lesser intrusion into one's expectation of privacy than an inventory of closed areas and sealed parcels. In any case, *Ware* would seem to indicate that the Seventh Circuit is favorably inclined toward making a distinction between "administrative inspections" and the more traditional search for evidence or contraband.

### C. Tenth Circuit

Little precedent upon the inventory search issue is available from the decisions arising out of the Tenth Circuit. Without a great deal of discussion, the court held that the warrantless examination of a vehicle identification number was an unreasonable search in *Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965). In dictum, a district court rejected the claim that an inventory of an impounded vehicle is necessary to protect the officer from false tort claims. *Dodge v. Turner*, 274 F. Supp. 285, 291 (D. Utah 1967). Although the precise question of whether inventories are valid, has not been answered, it appears that the Tenth Circuit does not favor searches in the administrative mold.

## VII. Federal courts with conflicting decisions upon the inventory problem or holdings upon related issues.

### A. Second Circuit

The only case on point within this jurisdiction is *United States v. Smith*, 340 F. Supp. 1023 (D. Conn. 1972), where the court held that a search was valid either as one with probable cause or as a valid routine inventory to protect the contents of the car and to guard against later claims of loss or theft. *Id.* at 1028. *See United States v. Capra*, 372 F. Supp. 603 (S.D.N.Y. 1973), wherein security men for the Penn Central were unable to open luggage that they suspected to contain explosives. In an "informal" manner, local detectives were called in to open the locks and narcotics were found. *Id.* at 107-08. Citing *Dombrowski*, the court ruled that the contraband was admissible because the actions of the detectives did not constitute an intrusion with exploratory intent to which the fourth amendment was meant to apply. 372 F. Supp. at 608-09.

### B. Third Circuit

In a cautious opinion, the court in *United States ex rel. Clark v. Mulligan*, 347 F. Supp. 989 (D.N.J. 1972), held admissible contraband observed in plain view when an officer opened the defendant's car door to begin an inventory. *Id.* at 992. Analogizing from the inventory search cases of the Fifth Circuit, a district court upheld the inventory of a wallet discovered in plain view inside an impounded automobile. *United States v. Young*, 369 F. Supp. 540 (D. Del. 1974).

### C. Fourth Circuit

Noting that neither custody, a duty to protect property located in an impounded vehicle, nor the remote danger of tort claims, especially in light of available alternatives, was sufficient justification, the court in *Cabbler v. Superintendent*, 374 F. Supp. 690 (E.D. Va. 1974), declared that an inventory of the contents of a locked trunk was patently unreasonable; *Dombrowski* was limited to its facts. *Id.* at 698-701.

In *Powers v. United States*, 439 F.2d 373 (4th Cir.), *cert. denied*, 402 U.S. 1011 (1971), a vehicle number examination was upheld. 439 F.2d at 376. The court, in effect, adopted the "reasonable suspicion" test of *Terry v. Ohio*, 392 U.S. 1 (1968). 439 F.2d at 376.

## D. Sixth Circuit

The cases within this jurisdiction seem somewhat contradictory upon the issue of the validity of inventory searches. The Court of Appeals has ruled that examining a vehicle identification number is not a search even if the police have probable cause to believe that the car was stolen. *United States v. Graham*, 391 F.2d 439, 443 (6th Cir.), *cert. denied*, 393 U.S. 941 (1968). However, the court does not appear to be inclined toward extending this doctrine to include inventory searches of impounded cars. *Cf. Lewis v. Caldwell*, 476 F.2d 467, 471 n.6 (6th Cir. 1973), *rev'd on other grounds*, 417 U.S. 583 (1974). Although police have the right to inventory goods in an arrestee's hotel room, it is not entirely clear whether or not this intrusion is a search for purposes of the fourth amendment. *Compare United States v. Blackburn*, 389 F.2d 93 (6th Cir. 1968) (notebook and pistol found in defendants' hotel room following their arrest held admissible because they were discovered pursuant to standard police procedure to place arrestee's belongings in a safe place), *with United States v. Robbins*, 424 F.2d 57 (6th Cir. 1970), *cert. denied*, 402 U.S. 985 (1970) (second inventory conducted at police station consisting of search of defendant's suitcase held valid as a continuation of inventory of property belonging to persons taken into custody).

In *United States v. Gerlach*, 350 F. Supp. 180 (E.D. Mich. 1972), police impounded and inventoried a vehicle blocking a small parking lot. The court found that the contraband discovered was admissible since it was the product of a routine, non-exploratory procedure designed to protect defendant's property. *Id.* at 183. Justifying its decision, the court declared:

Because the keys were left in the vehicle, it was in the interest of the defendant and police to inventory all property in places that were open or could be opened through the use of the keys. No locks were forced.

*Id.* at 183. Since the police could have removed the car, locked it, and retained the keys, the court failed to explain why the presence of the keys in the car or the fact that no locks were forced validated the inventory search.

In contrast, the court of appeals held unconstitutional the inventory of a car being held at police direction by a service station owner who, apparently, could have locked it in his garage. *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972). Distinguishing *United States v. Lipscomb*, 435 F.2d 795 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971), where the automobile was held by police, the court stated: "There was no reason to inventory the contents of the automobile . . ." 455 F.2d at 1231 (emphasis added). Apparently, the "reason" present in *Lipscomb* and absent in *Williams* was physical possession by the police and its possible implications of a duty to protect the owner's property, potential tort liability, and an ill-defined notion that police who have possession of a car have a right to know its contents. In light of the conflicting law in the Sixth Circuit, it is problematical what significance, if any, this distinction will have in future cases.

## E. Ninth Circuit

It was held in *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967), that an inspection of the vehicle identification number was reasonable although the court was "inclined" toward the view that such an intrusion is not a search. *Id.* at 393-94. In dictum, the court expressed approval of the practice of impounding and making inventories of automobiles in similar situations, but failed to clarify the permissible scope of such inventories. *Id.* at 392.

In something of a watershed case because of its factual setting, the Ninth Circuit held that police may seize evidence or contraband *in plain view* during the course of an inventory to protect the owner's valuables and the police from tort claims. *United States v. Mitchell*, 458 F.2d 960 (9th Cir. 1972). After impounding defendant's car, the officer observed watches on the front seat and floor around a partially open

noticed a pistol inside the case. *Id.* at 960. Defendant was subsequently charged with possession of a weapon by a felon. *Id.* at 961. It is submitted that this may be the most extreme circumstances to which the plain view doctrine can be applied.

In the course of its opinion, the *Mitchell* court approved the inventory of goods in plain view, but found it unnecessary to decide whether or not such intrusions are searches. *Id.* at 961-63. The court specifically reserved the question of inventories into closed parcels or areas of a car not in plain view. *Id.* at 962-63.

#### F. District of Columbia Circuit

In its first encounter with the subject, *Harris v. United States*, 370 F.2d 477 (1966) (en banc) (per curiam), *aff'd*, 390 U.S. 234 (1968) (per curiam), the court of appeals managed to sidestep the inventory issue. After impounding a car as evidence, police made an inventory for valuables. The inventory complete, an officer opened the right front door to roll up the window and lock the door. He then discovered the evidence inside the doorjamb. 370 F.2d at 478. Since the evidence was not found during an inventory, that issue was not decided. The court ruled that opening the door of the impounded vehicle to roll up the window and lock the door was not a search. *Id.* at 479. As a result, evidence falling into plain view during the course of such a limited, protective measure was admissible. Since the Supreme Court affirmed on the same basis, *Harris v. United States*, 390 U.S. 234 (1968) (per curiam), it remains to be seen whether or not the greater intrusion of the inventory search can be justified under this protection analysis.

A district court upheld an inventory search to protect valuables, rather than a search for evidence of contraband, in *United States v. Fuller*, 277 F. Supp. 97 (D.D.C. 1967), *aff'd per curiam*, 433 F.2d 533 (D.C. Cir. 1970).